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Two pieces of literature by Thomas A. Wills are contained in this document: (1) A complete programed text in law, "A Programmed Text in Criminal Law," and (2) a study comparing instruction with versus instruction without the use of programed texts, "Development and Evaluation of a Programed Text in Criminal Law." In the latter, six control and six experimental groups were used to test the hypothesis that students can acquire a basic working knowledge of the rules of law by independent, unsupervised study of a programed text. The results supported the hypothesis. It was concluded that the acquisition and application of complex abstract material can be taught efficiently with programed material. (HW)

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U.S. DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE

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OFFICE OF EDUCATION

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DEVELOPMENT AND EVALUATION OF A PROGRAMMED TEXT IN CRIMINAL LAW

Project No. 5-0797
Contract No. SAE OE 5-10-016

Thomas A. Wills

June 1967

The research reported herein was performed pursuant to a contract with the Office of Education, United States Department of Health, Education and Welfare. Contractors undertaking such projects under Government sponsorship are encouraged to express freely their professional judgment in the conduct of the project. Points of view or opinions stated do not, therefore, necessarily represent official Office of Education position or policy.

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I. Introduction

The major purpose of legal education is to help students become proficient in a problem-solving process--legal reasoning. Legal reasoning involves analysis of cases to discern the principles in issue, synthesis of principles into unified concepts, and application of the concepts to resolve new problems. A minor purpose of legal education is to help students learn information--specific rules of law.

Traditionally, freshman law students learn the process of legal reasoning by discussion of cases in class. The professor expects students to learn the salient rules of law from textbooks studied outside of class. Frequently, he finds that the students have not acquired sufficient knowledge of the rules of law from textbooks, and that he must spend considerable class time correcting this deficiency. If class time must be devoted to rule learning, the student may become a mere technician. If class time could be devoted to legal reasoning, the student could become a versatile and creative attorney. If class time could be freed from rule learning, the professor could help the students become aware of the professional responsibilities of the bar through discussions of principles of legal ethics and social implications of law.

Class time could be freed for the major purpose of legal education by use of a more efficient textbook from which the student, by independent, unsupervised study, could acquire a basic working knowledge of the salient rules of law. Past experience indicates that traditional texts are not satisfactory for this purpose. Traditional texts are oriented toward the single purpose of recording accurately the state of the law. Programmed texts state such information accurately, but in addition, are oriented toward the presentation of the material in a more efficient manner for effective learning. Usually, the "teaching efficiency" of traditional law books is not tested. Programmed texts are tested and refined until students of a specified population learn to specified criteria of proficiency. Evidence from both controlled experiments and field experience (2) (4) indicates that programmed texts constructed in this manner are efficient self-instructional devices.

In order to determine whether programmed material may be one way of freeing class time for instruction in legal reasoning, this project was designed to test the hypothesis that students can acquire a basic working knowledge of the rules of law by independent, unsupervised study of a programmed text.

II. Method

This project was designed to test the hypothesis that students can acquire a basic working knowledge of the rules of law by independent, unsupervised study of a programmed text. This hypothesis was tested by comparing the performance of students taught in the traditional manner with the performance of students who received relatively less class instruction in rule learning, but were exposed to A Programmed Text in Criminal Law. (7)

During 1964-65, six control groups (students studying criminal law in six law schools) received conventional instruction. The professors assigned a casebook, a traditional textbook, and devoted substantial class time to rule learning. At the end of the semester, the students in each school except one answered a standard law school examination supplied by this investigator. [See Appendix B]

During 1965-66, six experimental groups (students studying criminal law in the same six law schools) were assigned the same case and textbooks as the control group in each school, and in addition, were supplied A Programmed Text in Criminal Law as supplemental--but not required--reading. The same instructors taught the control and experimental groups in each school except one. This investigator asked the instructors to devote as little time as possible to rule learning in the experimental group classes. At the end of the semester the same examination which had been administered to the control groups was administered to the experimental groups.

A definitive test of the hypothesis would require comparing test scores of a control group with those of an experimental group which had used no text other than A Programmed Text in Criminal Law, and which had received no instruction in substantive criminal law in class. Such extreme conditions could not be imposed upon the instructors at the six cooperating schools, and therefore no such demonstration was included in the original proposal. This investigator, however, did conduct such a demonstration at his own school. This experimental group (E**) was assigned a casebook (1) which does not cover the rules of law for any specific crimes, and was also supplied A Programmed Text in Criminal Law as supplemental--but not required--reading. No class time was devoted to rule learning. At the end of the semester, this experimental group received the same examination as the other groups. The results were compared with the results of the control group from the same school.

The differences between the means of the examination results of the control and experimental groups were evaluated by calculating the "t" scores. Each instructor was interviewed to determine his impressions and to determine whether or not he had been able to devote less time to rule learning in the experimental group classes.

III. Results

An examination of Table No. 1 shows that the difference between the means favored the experimental group in all cases except two. All of the mean differences obtained were statistically significant except one. The direction of difference was in support of the basic hypothesis.

Table No. 1

Examination Results

School	No. of Students C	No. of Students E	Diff. between means of exam scores of C and E	"t" scores	P
A	108	85	- 12.36	9.03	.001
B*	100	116	--	--	--
C	48	60	+ 41.95	10.75	.05
D	65	25	+ 17.65	5.66	.05
E	61	56	+ 14.14	4.25	.001
E**	61	53	+ 44.78	10.36	.001
F	9	47	+ 29.56	5.75	.05

C = Control Group E = Experimental Group
*Difference between means not within limits of error
**Experimental group taught by investigator. No class time devoted to rule learning

Table No. 2 presents a summary of the interview results. For each school, the instructor's responses to the four questions are presented. Note that the control group was not found to be "superior" to the experimental group in any instance. In all instances except one the experimental group spent less class time in rule learning (Question No. 4).

Table No. 2

Interview Results

School	Question No. 1	2	3	4
A	ND	ND	ND	ND
B	ND	ND	E	E
C	ND	ND	E	E
D	E	E	E	E
E	ND	ND	E	E
F	E	E	E	E

ND = No Difference
E = Experimental Group
C = Control Group

Questions:
WHICH GROUP, IF EITHER,
1. was better prepared for daily class discussion?
2. was superior in issue perception?
3. demonstrated superior understanding by quality of questions asked?
4. spent least class time in rule learning?

Each participating professor was interviewed to determine the relative amount of class time devoted to rule learning in the control and experimental groups. The interview results obtained from the instructor at school A were not useful due to conditions described in the Discussion section below. The professors at schools B and E merely indicated that they had devoted less class time to rule learning in the experimental classes. Both instructors use the "lecture method" of teaching. The professor at school C stated that with the experimental group he had had time for "in-depth discussions" as never before. The professor at school D said that if the programmed text were required, he would save enough time in his substantive law class to incorporate criminal procedure and trial practice. The professor at school F stated that, with the time saved by use of A Programmed Text in Criminal Law, he was able to introduce criminal procedure into the course, and also some jurisprudential principles which heretofore he had not had time to discuss. He commented that he had felt free to do so because the students' "fog" had lifted sooner.

IV. Discussion

At school A the performance of the control group was superior. At this school the demonstration was disrupted by a change in the curriculum. The control group studied criminal law with the cooperating instructor as directed. The first semester of the following year the experimental group studied substantive criminal law (crimes) with a different instructor, without the benefit of the programmed text. This group received A Programmed Text in Criminal Law the second semester during the course in criminal procedure (trial procedure) taught by the cooperating instructor. The members of the experimental group would have had little incentive to read the programmed text during the second semester because they already had completed the course in substantive criminal law and the programmed text would not help them in criminal procedure. In addition, the examination used in this demonstration did not affect the students' final grades at school A. At all other schools the examination result did have some degree of influence upon the final grade. Further, the experimental group at school A took the examination for this demonstration one semester after the completion of the course in substantive criminal law. These differences in methodology decrease the significance of the negative results obtained in school A.

In school B the performances of the control and experimental groups were not significantly different. Perhaps this result is due to the fact that the instructor at this school administered his own examination which was directed largely toward local law. Under these circumstances A Programmed Text in Criminal Law would not have been particularly helpful. All other cooperating instructors used the examination supplied by this investigator. The performance of the experimental group was superior at all other schools.

The results of the interviews (Table No. 2) show that all instructors used relatively less class time for rule learning in the experimental groups. The exact degree to which the results support the hypothesis depends upon an accurate measure of how much less class time had been devoted to rule learning in the experimental groups than in the control groups. To acquire such information, an assistant would have had to time the activities of each class. Since such a burden could not be imposed upon the cooperating professors, accurate timing was not included as part of the proposal. However, accurate timing was possible with the experimental group taught by this investigator. No class time was devoted to rule learning.

A definitive test of the hypothesis underlying this demonstration was conducted by this investigator at his own school. The experimental group (E**) used no text other than A Programmed Text in Criminal Law and received no instruction in substantive criminal law in class. The examination results of this experimental group were compared with the control group at this school. The "t" score (10.36--.001 significance level) indicates that the experimental group's superiority over the control group was as significant as any found.

V. Conclusions

The positive results obtained in four of the cooperating schools, coupled with the findings of this investigator's study at his own school, employing more definitive experimental controls, support the basic hypothesis that students can acquire a basic working knowledge of the rules of law by independent, unsupervised study of a programmed text.

This investigator can recommend two areas for further investigation. The first deals with programmed material as an instructional device, and the second deals with programmed material as a testing device.

Evidence from many disciplines indicates that programmed materials are efficient self-instructional devices. As the population increases and the information to be learned increases, programmed texts will play an increasingly important role in educational systems. Centrally located programmed computers, which make information available to scholars all over the United States, probably will become common. Computers have a wide range of capabilities and thus are particularly suitable for branched programs which require flexibility of presentation. This investigator recommends that the U. S. Department of Health, Education, and Welfare

1. continue to promote programmed texts such as A Programmed Text in Criminal Law developed for this project; and
2. promote the conversion of such texts into programs adapted to computer-aided instruction.

Programmed legal material coupled with an examination on that material may be an excellent aptitude test for prospective law students. The demonstration reported herein has shown that students who learned from a programmed text score significantly higher on a typical law examination than students taught in the traditional manner. This point has been demonstrated previously by this investigator in an experiment in which variables were subject to stringent control (8). In that experiment, the only source of information available to the experimental group (N-17) was a short programmed text of the crime of burglary. A matched control group (N-17) was taught by traditional methods, attended class discussion, and used a casebook (3) and a text (5). The experimental group's test scores were superior. The "t" score (4.65), evaluating the difference between the means, was significant at the .01 level. A copy of this study is appended.

Since the examinations were typical law questions, the evidence implies that test scores of material learned from a programmed text may be direct measures of specific skills necessary for success in law school, and therefore may correlate highly with law school grade averages (LSG). This hypothesis has been tested twice. In each case, students studied a short program followed by an examination. The procedure was completed within one fifty-five minute class period. The examinations were graded and the following correlation coefficients were obtained:

Table No. 3

Study	Variables	Pearson R	Significance level
No. 1 (N-13)	LSAT vs LSG (3 yrs.)	+.225	Not signif.
	Undergrad.avg. vs LSG (3 yrs.)	+.250	Not signif.
	Program + Test vs LSG (3 yrs.)	+.527	.10
No. 2 (N-40)	LSAT vs LSG (first sem.)	+.389	.05
	Undergrad.avg. vs. LSG (first sem.only)	+.391	.01
	Program + Test vs LSG (first sem.only)	+.533	.001

LSAT = Law School Admission Test LSG = Law School Grade average

The correlations in Table No. 3 justify continued investigation of the use of a program designed for testing. A program is usually designed for maximum teaching efficiency. However, the proposed "testing program" would be designed to teach differentially so that most of the students would learn most of the concepts, some students would learn only the simple concepts, and only the high ability students would learn the more subtle concepts. Similarly, the examination would be designed to test differentially. The correlations between the Program + Test results and the Law School grade averages (LSG) referred to in Table No. 3 (.527 and .533) were based upon a "teaching program" rather than a "testing program." A "differential testing program" should produce higher correlations. The proposed aptitude test would consist of such a "differential program" and a graduated series of test questions capable of being machine graded.

VI. Summary

The major purpose of legal education is to teach legal reasoning. A minor purpose is to teach rules of law. Under optimum conditions students learn rules of law by independent study of texts, and the professor devotes most of class time to skilled instruction in legal reasoning. Frequently, students either cannot or do not learn sufficient law from traditional texts and the instructor must divert considerable class time from legal reasoning to rule learning. This use of class time downgrades legal education. Experimental evidence and field experience indicate that programmed texts may be more efficient instructional devices than traditional texts.

In order to determine whether programmed material may be one way of freeing class time for instruction in legal reasoning, this project was designed to test the hypothesis that students can acquire a basic working knowledge of the rules of law

by independent, unsupervised study of a programmed text. The hypothesis was tested by computing "t" scores of the difference between the means of six control groups and six experimental groups. The control groups were taught in the traditional manner and a substantial portion of their class time was devoted to rule learning. The experimental groups received A Programmed Text in Criminal Law as supplemental--but not required--reading. A smaller portion of their class time was devoted to rule learning. One experimental group received no class instruction in substantive criminal law. A typical law examination designed to test both knowledge and application was administered to all groups. All but one experimental group scored as well as or significantly better than the control groups. The results support the hypothesis.

VII. References

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VIII. Appendix A

The investigator designed A Programmed Text in Criminal Law which covers the following substantive criminal law:

- GENERAL PRINCIPLES
  - Voluntary conduct and causation
  - Intention
  - Recklessness
  - Criminal negligence
  - Transferred intent
  - Defenses
    - Mistake of fact
    - Ignorance of law
    - Infancy
    - Insanity
    - Drunkenness
    - Consent

- CRIMES
  - Battery
  - Attempts and assaults
  - Homicides and defenses to homicide
  - Larceny and related crimes
    - Embezzlement
    - False pretenses
    - Robbery
    - Receiving stolen goods
  - Burglary

The text, a linear program based upon Skinner's operant conditioning theory (6), was constructed as follows. A series of frames designed to analyze a particular point of law was submitted to a testee who studied the material in the presence of the investigator and reported his reactions. Where changes were indicated, the frames were refined and the process repeated until the value of one testee's reaction seemed to be exhausted. The frames were then submitted to a group of approximately ten testees, again refined and retested until substantially all testees had learned substantially all of the principles. The investigator endeavored to use testees of the general educational level of freshman law students. By this process A Programmed Text in Criminal Law was constructed from which students of a given level of ability can learn the subject matter to predetermined criteria of proficiency. Due to limitations in time and number of testees, not all frames were tested as thoroughly as described, but the process was followed as much as possible.

The examination questions used in this demonstration were composed by three professors of law who had not read A Programmed Text in Criminal Law and were not otherwise participating in the demonstration. [See Appendix B]

The investigator coded the examination answers before grading. This attempt at objectivity was only partially successful, because some students in the experimental groups used vocabulary unique to A Programmed Text in Criminal Law. The examination was composed of two essay questions and one question consisting of five sections which could be answered either "yes" or "no." A mechanical method of grading the two essay questions was employed. A given number of points was awarded for the recognition of an issue, for the application of the appropriate law to resolve the issue, and for the accuracy of application. Usual premiums given for less concrete matters, such as depth of discussion and policy arguments, were avoided in the interest of uniform grading.

The cooperating law schools were Drake University, University of Florida, University of Miami, Ohio State University, Stetson University, and the College of William and Mary.

Appendix B Copy of FINAL EXAMINATION in Criminal Law
Professor T. A. Wills

I.

A dope peddler X had a small package of opium worth about $25.00 taped onto his chest. Two addicts, A and B, knew this and planned to surprise him in his sleep and get it. They found that the rear wooden door of his home was open and that the screen in the screen door was partly torn. A cut the screen a bit more and said, "Now I'll grab him, and you rip the opium off his chest." They stepped through the door and found X in bed, but awake. X knew what they wanted, and knew it was useless to resist, so he untaped the package and gave it to B. As they turned to leave, X sounded an alarm bell. B dropped the package and they both fled outside to escape. B ran in front of a car and was killed instantly. What crimes, if any, were committed?

II.

Able owned a large country house furnished with many valuable antiques. On a number of occasions efforts apparently had been made to get into the house in his absence, and recently prowlers had been seen in the general neighborhood. Consequently, Able, who was taking his family to Florida for the winter, caused a six foot wire fence, topped by three strands of barbed wire, to be placed around his property. Then, just after the family's departure, he set up a spring gun on the stairs off the front hall so that the gun would fire into the front door as it opened. The back door was similarly protected. A side door, visible from a neighbor's house, was left in a normal, locked condition, to be used by the family on its return.

A week after the Ables had gone, a youngster named Pell, climbing the fence to retrieve his stray cat, caught his heel in the barbed wire and tumbled to the ground on Able's side of the fence. The child was not seriously injured, but later at the hospital, caught pneumonia and died.

Budd, a state policeman, then went to Able's house in an effort to interrogate him regarding Pell's death. When there was no answer to his knock, he attempted to push open the front door. The door would not open, but it gave just enough to trigger the spring gun which fired a shot into the policeman's abdomen. Other officers then came to Able's house in a search for the missing officer. There they not only found the wounded policeman, but also the body of Blank, a professional burglar who had managed to enter Able's house through a window, and who was then shot in the back and killed as he attempted to carry a priceless antique clock out the rear door.

Proceeding to the hospital at break-neck speed to secure a desperately needed blood transfusion for the critically injured officer, the ambulance driver ran head-on into a truck loaded with steel. No one survived the crash. It was apparent that the lives of those in the two vehicles were snuffed out instantly.

A state statute provides that "every killing of a human being by the act, procurement or culpable negligence of another not determined to be murder or excusable or justifiable homicide shall be deemed manslaughter." Would you, as District Attorney, cause Able to be charged with murder or manslaughter of either Pell, Budd, or Blank? Why?

III.

Do the following cases contitute common law larceny? You may answer yes or no for each subdivision and add a sentence or two explaining the essential basis for your conclusion.

(a) D saw an unattended bicycle in front of an apartment building while he was hurrying to a dental appointment about 10 blocks away and decided to use it in an effort to be on time. He knew there was a new bicycle rack in front of the YMCA next to the dental clinic where he could chain and lock the bicycle to the steel framework and thereafter proceed home by bus. Going down a steep hill approaching the clinic, the bicycle's brakes failed and D leaped off. The bicycle crashed into a truck and was demolished.

(b) In the foregoing case, when the bicycle's brakes failed, D managed to stay in control and missed the truck, but the narrow escape so unnerved him that he rode the bicycle home. He worried about returning the bicycle and contemplated riding it back to the apartment, but the risks seemed too great. Finally, he pushed the bicycle into a cistern where it was discovered during a Health Department inspection conducted a few weeks later. Because of the license on the bicycle, the owner got it back in good condition.

(c) D saw the unattended bicycle in front of an apartment where he had been visiting. It resembled his bicycle and he concluded that it was, although the slightest observation or examination would have shown that it was not. Actually, his own bicycle had been stolen an hour earlier. The bicycle's owner saw him riding off and called out loudly without response. Then the owner hastily got an automobile and tried to cut D off. This resulted in an accident in which the bicycle was demolished.

(d) D falsely told the bicycle's owner that he was late for an appointment downtown, and would like to use the bicycle for an hour or two. Actually, he meant to sell it because of his desperate need for some ready cash. At a second-hand shop, D discovered he would need to display evidence of ownership of the licensed bicycle before he could sell it there. He then rode the bicycle back and turned it over to the owner at the agreed upon time.

(e) The owner allowed D to use the bicycle to run errands for him. On one such mission, D stopped by a pawnshop, pawned the bicycle, and received $20.00 for it. The pawn ticket indicated the holder could redeem the bicycle at any time within one year by paying $25.00 to the pawnbroker. The next day the owner asked D where the bicycle was. D told the whole story, gave the owner the ticket and the latter secured the bicycle after paying $25.00 to the pawnbroker.

A PROGRAMMED TEXT IN CRIMINAL LAW

by

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Professor of Law

September 1965

Revised February 1967

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School of Law

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EA 001 457

NOTE TO THE INSTRUCTOR

The purpose of this text is to free class time for the most creative efforts of each instructor. Rather extensive tests have shown that most freshman law students can learn the fundamental rules of criminal law from this text. Therefore, the instructor is relieved of the chores of pounding and repeating "black letter law" in class and may use this time for more subtle problems of analysis and synthesis, policy considerations, interdisciplinary relationships, or whatever matters he considers to be most beneficial to the students.

This text is part of a project sponsored by the United States Department of Health, Education and Welfare, Office of Education. I would be happy to attempt to answer any questions and would appreciate any observations or comments.

Thomas A. Wills
Professor of Law

September 1965

Revised February 1967

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NOTE TO THE STUDENT

This text is designed to help each student learn the fundamental rules of criminal law by himself at his own pace, and will serve its purpose best if used for daily preparation rather than a cram outline for examination. The knowledge acquired should make class discussions more stimulating and rewarding. Most students who use the text correctly may be confident that they have mastered the concepts presented and can apply them to new factual situations and express their solutions in a logical manner. In addition to learning the basic concepts, students will have accumulated a great deal of practice in the technique of writing law examinations.

A PROGRAMMED TEXT IN CRIMINAL LAW

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- E. Receiving stolen goods LA 112

V. Burglary BR 1

INSTRUCTIONS

On each page one or more words may be omitted. Each omission will be indicated by a blank:__________. Write the appropriate word or words in the blanks. In some instances, the answer is not necessarily expressed by a particular word or expression, but involves a concept which might be expressed in different ways. In such a case, any response which expresses the concept is correct. Check yourself by proceeding to the next page and compare your response with the answer given in the upper lefthand corner. If your response is incorrect, cross it out and write the correct answer. Don't go from one page to the next until you have written the correct answer.

GENERAL PRINCIPLES OF CRIMINAL RESPONSIBILITY

I. An act

A. Voluntary conduct

A gang of thieves slipped into a store in the middle of the night and were accosted by a nightwatchman. As they all fled without taking anything, one of the gang hit the nightwatchman on the head with a pistol. The blow on his head caused a concussion so hospitalization was required. The watchman responded to treatment and was well on the way to recovery, but an intoxicated intern mistakenly gave him a sedative intended for a different patient and the watchman died from an allergic reaction. What persons are responsible for what crimes? Is the fact that nothing was taken a defense to larceny or to burglary? Is the person who hit the watchman responsible for his death, in spite of the conduct of the intern? Is the intern responsible, or both, or the entire gang?

All sorts of problems arise, but the method of solution follows a simple pattern. First, you must know the essential elements of a particular crime. Second, you must know the facts of the case--what happened. Then you decide whether or not the essential _________________ of a particular crime are satisfied by the ________________ of the case.

elements

facts

Obviously one of your major purposes in this course will be to learn the essential elements of various crimes. Another purpose will be to learn how to apply the facts of the case to the elements in order to determine if the elements are satisfied. But first, notice some general principles that are helpful because they apply to crimes generally.

Criminal responsibility is based upon voluntary conduct which must have been the proximate cause of a criminal result, and is accompanied by a mental element. In this section you will analyze the voluntary conduct, causation, and criminal result. In the following sections you will analyze the mental element. The first requirement--"voluntary conduct"--has a special meaning in law. The conduct may be either

1. a voluntary (conscious) act; or
2. the voluntary (conscious) omission of a legal duty.

First, consider the "voluntary act."

Suppose a sleepwalker, while asleep, shot and killed his wife. He was charged with murder. The issue is whether or not

____

____

the shooting by the sleepwalker while he was asleep was a voluntary act.

This requirement of volition is so universally understood that frequently statutes don't specify that the act must have been voluntary. For example, one definition of murder in the second degree is:

> The unlawful killing of another when perpetrated by any act imminently dangerous to another. . . .

Even though the definition refers to "any" act rather than to a "voluntary" act, no criminal responsibility for murder in the second degree would result unless ______________________________

____

the act had been voluntary.

The second type of conscious conduct involves the voluntary omission of a legal duty.

Suppose a person watched a five-year-old girl drown in the ocean without attempting to rescue her. His conduct was voluntary--but not very active. It might be described as an "omission." Courts are very reluctant to base criminal responsibility upon an omission and ordinarily will not do so unless the person had been under a legal duty to act.

Suppose that the person was

1. a private citizen;
2. a lifeguard hired to protect swimmers;
3. the father of the little girl.

The issue in each instance is whether or not the particular person ____

____

had been under a legal duty to attempt rescue.

A dependable test to distinguish legal duties from mere social or non-legal obligations would be helpful, but no pat formula exists. The most dependable approach in any particular case is analysis of decisions rendered in preceding cases--precedent. Look up previous cases in which facts are similar to those in your particular case (citizen, lifeguard, father). Then determine whether in those preceding cases the court held the obligation to be a mere social obligation or a ______________ ______________.

legal duty

You have learned that all crimes require either voluntary conduct or a voluntary omission of a legal duty. But notice that some statutes defining crimes require only "possession." For example, a statute may make the possession of narcotics under certain circumstances a crime. Does mere "possession" amount to either a voluntary act or voluntary omission of a legal duty? Perhaps not obviously, but the state must prove either one or the other. To prove "possession" the state must prove either that:

1. the defendant had procured the narcotics (Procuring may be considered to be a ____________________ ________); or
2. the defendant had consciously retained the narcotics (Conscious retention may be considered to be a voluntary omission of a ____________ ____________to surrender or destroy the material).

voluntary act

legal duty

GENERAL PRINCIPLES

I. An act
  A. Voluntary conduct
  B. Causation

Now to the next point--causation. Criminal responsibility is based upon voluntary conduct (pulling the trigger of a gun) which caused a criminal result (death of a victim). If the voluntary conduct of a person had nothing to do with a criminal result (death), the person could not be held criminally responsible.

Sullivan thought that he could kill by voodoo, so he made a doll in the likeness of his enemy and stuck poisoned pins in it. His enemy happened to drown during a fishing trip. Sullivan would not be criminally responsible for the death because

____.

____

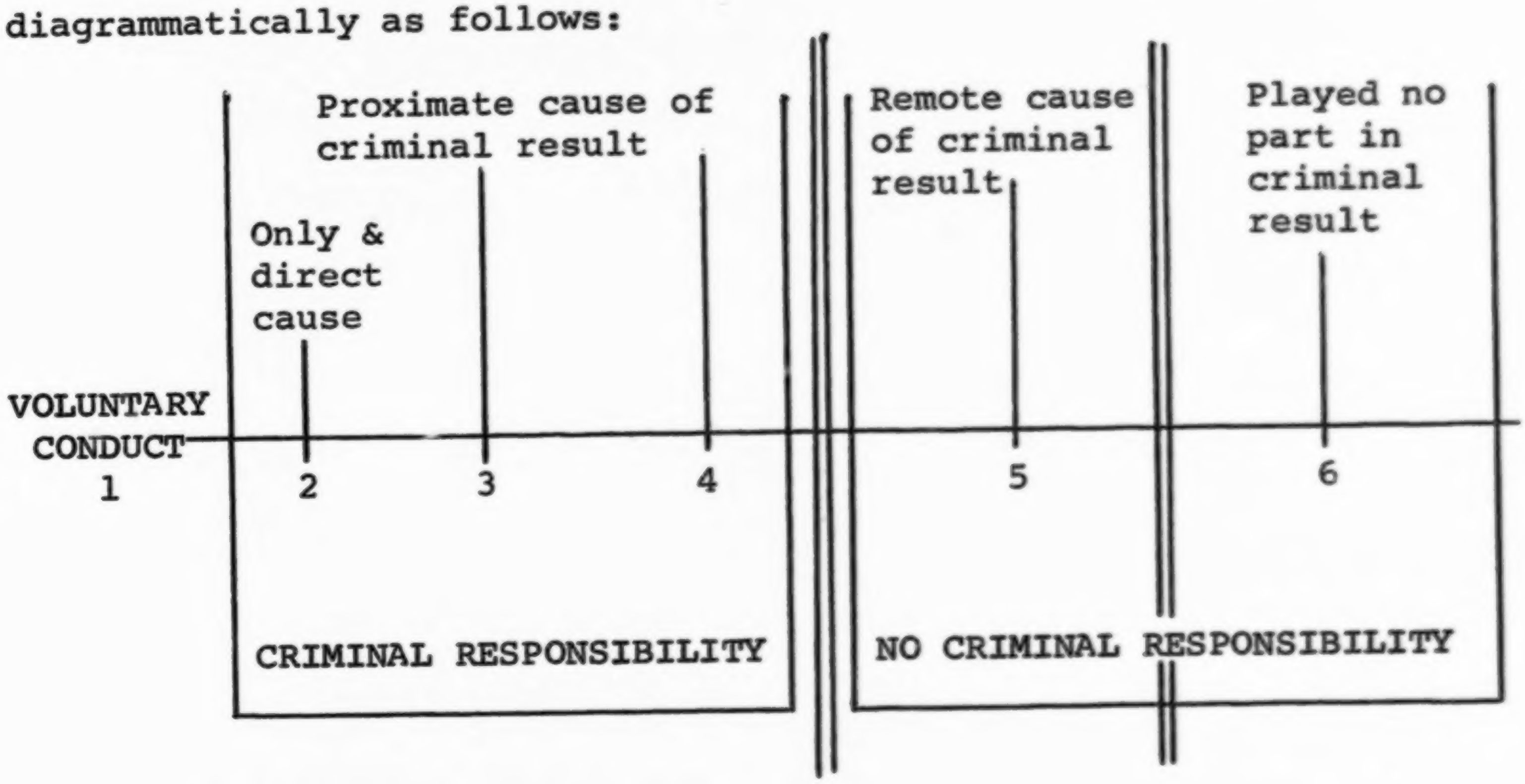
his voluntary acts had not caused the criminal result (death).

If a person's conduct had nothing to do with a criminal result, his conduct would not have been a cause, and he could not be criminally responsible. If a person's conduct were the only factor which produced a criminal result, his act would have been the only cause and the direct cause, and of course, he would be criminally responsible. Most cases are not so simple. Generally, the person's conduct is not the only and direct cause of the criminal result. Rather, his conduct is one of many indirect causes of the criminal result.

Suppose Peter hit Paulson who fell in front of a moving car. The driver slammed on the brakes. Casey, a passenger in the car, was thrown out of the car and killed by a blow from a passing bus. When Mrs. Casey heard that her husband was dead she suffered a stroke, was taken to a hospital where she was treated for several years, and where she died at the age of 80 on January 1st, from complications. Also, on the same January 1st in the same hospital a baby died during delivery. Peter's act was not the only and direct cause of Casey's death but rather one among many ____________ __________________ of death.

indirect causes

At times the person's voluntary conduct, though not the only and direct cause, is so closely connected (so proximate) to the criminal result that he should be criminally responsible. At times the person's voluntary conduct, though not entirely disassociated with the criminal result, is so remote that he should not be criminally responsible. This could be expressed diagrammatically as follows:


Proximate cause of criminal result
Only & direct cause
Remote cause of criminal result
Played no part in criminal result
VOLUNTARY CONDUCT
1
2
3
4
5
6
CRIMINAL RESPONSIBILITY
NO CRIMINAL RESPONSIBILITY

1 Peter hit Paulson
2 Only and direct cause of blow to Paulson
3 Casey thrown out of car
4 Casey killed by bus
5 Mrs. Casey's death
6 Death of baby

Since the number of fact situations is so great, a pat, simple, explicit test for proximate cause is impossible. Rather, the concept must be stated in groad, general terms:

> The conduct of a person was a proximate cause and would support criminal responsibility if it played an appreciable and substantial part in producing the criminal result.

The conduct of a person is merely a remote cause and will not support criminal responsibility if it had not played an appreciable and substantial part in producing the criminal result. Even though a person's conduct was not the only and direct cause, his conduct would have been a proximate cause if it ____

____

had played an appreciable and substantial part in producing the criminal result.

As you know, no one pat, explicit test to distinguish proximate from remote causes is possible, but the combination of the following three tests is helpful:

1. Where a defendant's conduct contributed to the criminal result, it played an appreciable and substantial part if it, alone, would have caused the criminal result. In such cases, the defendant's conduct would be a proximate cause.

Able cut a neighbor's right wrist so deeply that he would have bled to death within an hour. Baker cut the neighbor's other wrist. The second wound alone also would have caused death within an hour. Due to the combined effect, the neighbor died in less than an hour. Would Able be criminally responsible, even though Baker's act was a cause of death?_______ Explain:

____

____

____

Yes. Able's act contributed to the death and played an appreciable and substantial part because it alone could have caused death. Therefore, Able's conduct was a proximate cause.

Would Baker be criminally responsible, even though Able's act was a cause of death?______ Explain:________________________

____

____

____

Yes. Baker's act had contributed to the death and had played an appreciable and substantial part, because it alone would have caused death. Therefore, Baker's conduct was a proximate cause.

The first test applies to cases where a person's conduct alone would have caused the criminal result. The second test applies to cases where a person's conduct alone would not have caused the criminal result:

2. Where a defendant's conduct contributed to the criminal result (but acting alone it would not have caused the result) it nevertheless played an appreciable and substantial part if the other causes, acting without the defendant's conduct, would not have caused the criminal result.

Green shot a man in the chest, but this wound alone would not have caused death. Brown shot the same victim in the stomach. This wound alone would not have caused death. However, the combined effect of both wounds had caused death. Was Green's act a proximate cause of the criminal result?_______ Explain:

____

____

____

____

Yes. The act of Green (chest wound) contributed to the death and played an appreciable and substantial part, because Brown's act (stomach wound) would not have caused death without the added effect of the chest wound.

Was Brown's act a proximate cause?_______ Explain:_________

____

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____

____

Yes. Brown's act (stomach wound) contributed to the death and played an appreciable and substantial part, because the act of Green (chest wound) would not have caused death without the added effect of the stomach wound.

Suppose that Jones shot White in the chest. That wound alone would not have caused death. Five minutes later Smith cut off White's head. Could Jones be criminally responsible for White's death?______ Explain:______________________________

____

____

No. Jones' act had not actually contributed to the death--had played no part in it--and therefore was not a proximate cause of the death.

Gray cut a neighbor's hand. The cut was superficial and ordinarily would not have been serious. However, the neighbor was a hemophiliac and bled to death. Could Gray be held criminally responsible for the death?_______ Explain:____________

____

____

____

____

Yes. Even though the wound was superficial, Gray's act had contributed to the death, and it had played an appreciable and substantial part in the death because the victim would not have died from hemophilia alone--the wound was necessary.

Suppose in one situation a person had known the victim was a hemophiliac, and in another, had been unaware of this fact. Would this complication affect the issue of "proximate cause"?

_______ Explain:____

____

____

No. The act had played an appreciable and substantial part in causing the criminal result, whether or not the person had known of the hemophilia of the victim.

The first tests apply to cases in which a person's conduct contributed to the result in combination with other causes. The third test applies to cases in which an intervening force produced the result, not in combination with the person's conduct. Even in such extreme cases as this, the person's act may still have been a proximate cause:

3. Where the criminal result was caused by an intervening force, a defendant's act played an appreciable and substantial part
   a. if it had set the intervening force in motion; and
   b. if the occurrence of the result was a risk associated with the intervening force.

Both parts of the above test must be satisfied:

a. A defendant's act must have set the intervening force in motion; and

b. the occurrence of the result must have been a risk associated with the intervening force.

In order for a boy to play football in high school one of his parents had to sign a permission statement. His father did so. The boy was killed by an opponent in a game. The father was charged with homicide. What is the issue?________________________

____

whether or not the father's act of signing the permission statement was a proximate cause of his son's death.

What test would be used, in this case, to determine the issue?____

whether or not the father's act had played an appreciable and substantial part in the death. Where death was caused by an intervening force, a defendant's act played an appreciable and substantial part if it had set the intervening force in motion, and if the occurrence of the criminal result had been a risk associated with the intervening force.

In this same case, could the father be criminally responsible?______ Explain:___________________________________

____

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No. Here the intervening force was the act of an opponent in a game. The defendant's act (father's having signed the permission slip) had not set the intervening force (opponent's act) in motion. The opponent had acted independently. The father's act was not a proximate cause of the boy's death.

Black shot both his brothers and, under ordinary circumstances, both would have recovered. Both were taken to the hospital for treatment.

1. One brother's wife became disenchanted with him and killed him by poisoning his food.
2. The other brother suffered so much pain he became delirious, cut his throat, and died.

In each case death was caused by an intervening force. To determine if Black's voluntary act was the proximate cause, the issue in each case would be ________________________________

____

____

whether or not Black's act had set the intervening force in motion and whether or not the occurrence of the result was a risk associated with the intervening force.

Decide criminal responsibility in each case and explain:

1. ____

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2. ____

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____

1. No criminal responsibility. Black's act of shooting the victim had not set the intervening force in motion (the wife's act of poisoning).

2. Criminally responsible. Black's act had set in motion, through unbearable pain, the intervening force (cutting of throat), which caused death. The occurrence of such a result is a risk associated with extreme pain. Black's act played an appreciable and substantial part and was, therefore, a proximate cause of the criminal result.

Watson handed a knife to a fellow camper without paying attention to what he was doing, and cut the victim's thumb. Although the wound was superficial, the victim procured a tetanus shot from a physician who, it turned out, had scarlet fever. The victim contracted scarlet fever and died from it. Was Watson's act a proximate cause of death?_______ Explain:____________________

____

____

____

No. Watson's act had set in motion the camper's need for a tetanus shot, but the contraction of scarlet fever is not a risk associated with obtaining a tetanus shot.

(Note: Remember that both parts of the test must be satisfied. See p. GP 18)

Jackson shot a hunter in the leg. The wound was serious enough for the victim to require prolonged hospitalization. During the long confinement the victim developed pneumonia, due to inactivity and lowered resistance, and died from the disease. What is the predominant issue in the determination of whether Jackson's act was a proximate cause of death?____________________

____

____

____

Since Jackson's act had set in motion the long period of inactivity, the predominant issue is whether or not the intervening cause of death (pneumonia) is a risk associated with long confinement and inactivity.

(Note: This is an example of a borderline case. Some courts have held a defendant's act to be the proximate cause in similar situations.)

Forbush shot his hunting companion in the leg. The attending physician thought that the victim needed penicillin immediately, administered a shot without an allergy test first, and the victim died of an allergic reaction. What is the predominant issue in the determination of whether Forbush's act was a proximate cause of death?________________________

____

____

____

Since Forbush's act had set in motion the need for medical treatment, the predominant issue is whether the intervening cause of death (mistake of the physician) is a risk associated with the need for treatment.

(Note: Cases indicate that death due to gross mistreatment is not a risk associated with the need for treatment. For example, in this case, if the time were critical--an emergency--failure to test for allergy would probably not be considered gross mistreatment.)

Remember to check your judgment by precedent. Look up previous cases that involved similar voluntary conduct and criminal results as those in the case under analysis, and determine whether or not the courts considered the conduct to have been a proximate cause. An example of a well-established precedent is that courts have refused to hold defendants criminally responsible if death had not occurred within a year and a day from the time of the act. After such a long delay, the act would not have been a ____________________ ______________.

proximate cause

Note: You have just analyzed the following test:

3. Where the criminal result was caused by an intervening force, the defendant's act played an appreciable and substantial part
   a. if it had set the intervening force in motion; and
   b. if the occurrence of the result was a risk associated with the intervening force.

(p. GP 18)

The application of this test will be amplified later after you have learned the principles of intention, recklessness, and criminal negligence.

GENERAL PRINCIPLES

I. An act
    A. Voluntary conduct
    B. Causation
    C. Criminal result

Criminal responsibility is based upon voluntary conduct which must have been the proximate cause of a criminal result. Consider this definition of murder in the second degree:

> The unlawful killing of another when perpetrated by any act imminently dangerous to another. . . .

Notice that the definition requires both an act and a criminal result (killing of another--death). The criminal result is an integral part of the definition, and is necessary to establish criminal responsibility.

A marksman pulled the trigger of his gun and the bullet hit the center ring of the target. The marksman would not be criminally responsible because hitting a target is not a

______________ result.

criminal

A statute prohibits a person under twenty-one years of age from voting. A person twenty years of age pulled the lever of a voting machine (a voluntary act) to see how it worked, even though there was no election in progress. A crime was not committed because movement of the mechanism, without recording a vote, is not a ______________________ __________________.

criminal result

Of course, the criminal result is the factor which distinguishes one crime from another--death (homicides), injury to the person (battery), taking another's personalty (larceny). Thus, each particular crime is distinguished by its particular ________________ ______________.

(Note: The criminal result will be analyzed in more detail for each particular crime presented in this text.)

criminal result

SUMMARY OF GENERAL PRINCIPLES

I. An act

A. Voluntary conduct

The defendant's conduct must have been voluntary.
The defendant's conduct must have been either

1. a voluntary act, or
2. a voluntary omission of a legal duty (not a mere social obligation).

Even crimes which require only possession involve either a voluntary act (procurement) or voluntary omission of a legal duty (conscious retention).

B. Causation

The defendant's voluntary conduct must have been a proximate cause of the criminal result. The test is whether or not the defendant's act played an appreciable and substantial part in producing the criminal result.

The defendant's act need not have been the only or direct cause; it may have been one among many causes, so long as it was a proximate cause (played an appreciable and substantial part).

1. Where the defendant's conduct contributed to the criminal result, it played an appreciable and substantial part if it alone would have caused the criminal result.
2. Where the defendant's conduct contributed to the criminal result, but acting alone it would not have caused the result, it nevertheless played an appreciable and substantial part if the other causes, acting without the defendant's conduct, would not have caused the criminal result.
3. Where the result was caused by an intervening force, the defendant's act played an appreciable and substantial part if it had set the intervening force in motion, and if the occurrence of the result was a risk associated with the intervening force.

C. Criminal result

The criminal result is the distinguishing element of each particular crime.

I. This section began with the following problem:

> A gang of thieves slipped into a store in the middle of the night and were accosted by a nightwatchman. As they all fled without taking anything, one of the gang hit the nightwatchman on the head with a pistol. The blow on his head caused a concussion so hospitalization was required. The watchman responded to treatment and was well on the way to recovery, but an intoxicated intern mistakenly gave him a sedative intended for a different patient and the watchman died from an allergic reaction.
>
> Would the member of the gang who had hit the nightwatchman with a pistol be criminally responsible for his death?

You recall that the process of solving legal problems follows these steps:

First, you must determine the general principles of criminal responsibility. Thus far in the text you have learned that the general principles involve voluntary conduct and causation. (The last general principle--mental element--will be analyzed in the next section.)

Second, you must determine the facts of the case. The facts are given in the statement of the problem.

Third, you must decide whether or not the general principles are satisfied by the facts.

Write an answer to the above question. Consider each general principle in turn, determine if the principle is satisfied by the facts, and then proceed to the next. After you have finished, compare your answer with the one which follows.

The general principles of criminal responsibility require that the defendant's voluntary conduct must have been the proximate cause of a criminal result, and must have been accompanied by a mental element.

(Note: Remember, criminal responsibility depends upon the mental element as well as the voluntary conduct. Since you have not analyzed the mental element as yet, in all cases here, satisfaction of the mental element will be presumed.)

The requirements of voluntary conduct and criminal result are so obviously satisfied by the facts that no issue is raised and no discussion required.

The next requirement concerns causation. The voluntary conduct of the defendant must have been the proximate cause of the criminal result. The test to distinguish proximate from remote cause is whether or not the voluntary conduct played an appreciable and substantial part in producing the criminal result. Death was caused by an intervening force (mistreatment by the intern). When such is the case, the defendant's act played an appreciable and substantial part if it had set the intervening force in motion, and the occurrence of death was a risk associated with the force. Here, the defendant's act had set in motion the need for treatment. However, death was caused by gross mistreatment (mistake of identity of patients) by an intoxicated intern. Risk of death in such a manner is not associated with the need for medical treatment. The act of the defendant, therefore, had not played an appreciable or substantial part and was not a proximate cause of the criminal result. Therefore, the defendant would not be criminally responsible for the death.

II. A fourteen-year-old boy brought his girl friend to his home for dinner. During the course of the evening he became quite drunk. Nevertheless, his father let him use the family car to drive the girl home. The boy drove off the road and both were killed. Would the father be criminally responsible for the deaths? Remember, the general principles must be satisfied by the facts. Write an answer to the above question. After you have finished compare your answer with the one which follows.

The general principles of criminal responsibility require that the defendant's voluntary conduct must have been the proximate cause of a criminal result, accompanied by a mental element. The requirements of voluntary conduct and criminal result are so obviously satisfied by the facts that no issue requiring discussion is raised. Satisfaction of the mental element is presumed.

The next requirement concerns causation. The defendant's voluntary conduct must have been a proximate cause of the criminal result. The test to distinguish proximate from remote causes is whether the defendant's conduct played an appreciable and substantial part in the criminal result. Death was caused by an intervening force (act of son). In such cases, the defendant's act played an appreciable and substantial part if it had set the intervening force in motion and the occurrence of death is a risk associated with the intervening force. The father's act of allowing his son to take the car had set in motion the intervening force (son's driving while drunk and wrecking the car) and death _is_ a risk associated with a fourteen-year-old driving while intoxicated. Therefore, the act of the defendant played an appreciable and substantial part and was a proximate cause of the death.

The defendant could be criminally responsible because all general principles are satisfied--the defendant's conduct was voluntary and a proximate cause of the criminal result.

GENERAL PRINCIPLES

II. Mental Element

A. Intention

You have learned that criminal responsibility requires

A. Voluntary conduct which was a
B. proximate cause of a
C. criminal result.

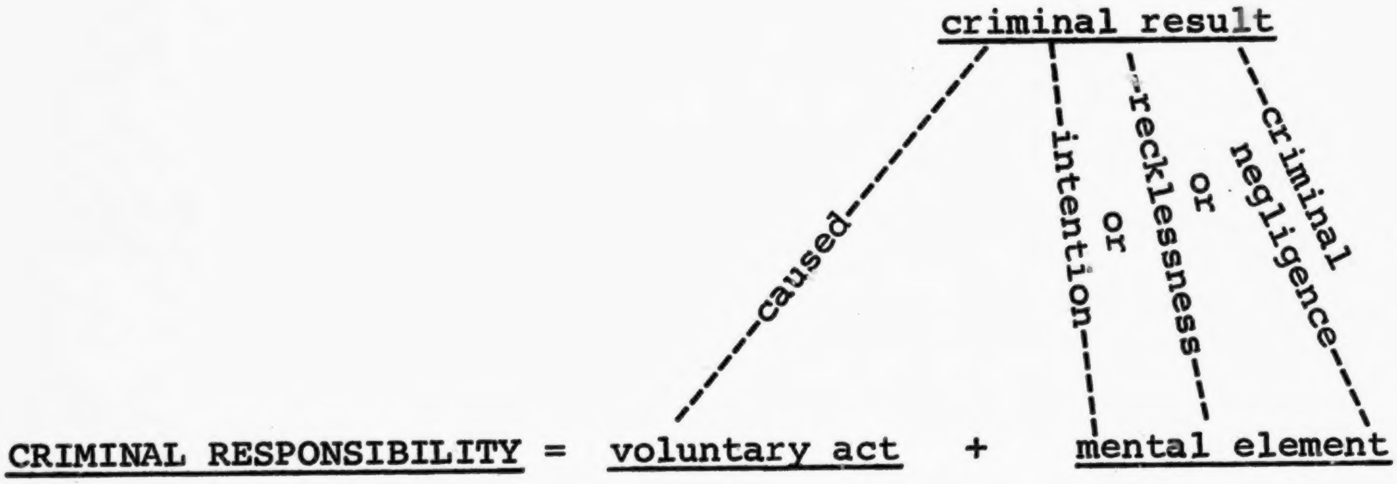
Suppose that a patient died during a surgical operation. The general principles of criminal responsibility that you have learned might be satisfied. The surgeon's conduct had been voluntary and could have been a proximate cause of death. Nevertheless, you probably think that the surgeon should not be held criminally responsible and you are correct. The doctor would not be criminally responsible unless he had intended to cause death or had operated in a reckless or criminally negligent way. Generally, criminal responsibility requires voluntary conduct which was a proximate cause of a criminal result, and in addition, a mental element, which may be intention, or recklessness, or criminal negligence. Most criminal responsibility, then, would follow one of these patterns:

1. The defendant's voluntary conduct caused the criminal result and the defendant had intended the criminal result to occur.

2. The defendant's voluntary conduct caused the criminal result and the defendant had been reckless with regard to the result.

3. The defendant's voluntary conduct caused the criminal result and the defendant had been criminally negligent with regard to the criminal result.

The general principles of criminal responsibility--voluntary act, causation, criminal result, and the mental element (intention, recklessness, or criminal negligence)--may be expressed diagrammatically as follows:


criminal result
caused
intention
or
recklessness
or
criminal negligence
CRIMINAL RESPONSIBILITY = voluntary act + mental element

First, we will consider cases in which voluntary conduct was a proximate cause of a criminal result and the defendant had intended the criminal result.

Con't confuse volition and intention. The requirement of volition refers to the act. The requirement of intention refers to the criminal result. The act must have been voluntary. The criminal result must have been intended. (See diagram)

As Moore was driving home, a dog ran in front of his car. Moore swerved the car and hit and killed a pedestrian. The prosecution argued that the defendant had intended the acts of driving and swerving, and therefore, he should be criminally responsible for an intentional homicide. Answer the argument:

____

____

____

____

It is true that the acts of driving and swerving had been intended, but the prosecution's argument is immaterial because the requirement of intention refers to the criminal result (death), not the act. Here, the facts indicate that the defendant had not intended the criminal result.

There are two tests for intention, either one of which will satisfy the requirement. The first test is:

1. Did the defendant do the act in order to cause the criminal result?

If so, he had intended the result. If a defendant shot a gun in order to kill his victim, he had ____________________ the death.

intended

If the defendant had done the act, but not in order to cause the result, he still may be held to have intended the result under the second test:

2. Had the defendant himself foreseen with substantial certainty that his voluntary act would cause the criminal result, in light of circumstances the defendant believed to be true?

A man threw a large bomb into a tightly packed crowd of people in order to disperse them. Several people were killed or injured. The defendant claimed that he hadn't intended to hurt or kill anyone; he had just wanted to disperse the crowd. Could he be held to have intended the deaths and injuries?

_______ Explain:____

____

____

Yes. Although he threw the bomb (but not in order to kill or injure) he obviously had foreseen these results as a substantial certainty.

Foreseeing the mere risk of some harm is quite different from foreseeing the result as a substantial certainty. To satisfy the requirement of intention, it is not enough to prove that the defendant had foreseen the criminal result as merely possible or probable. The prosecution must show that the defendant had recognized the criminal result as inevitable--had foreseen it as a substantial certainty.

Suppose that the man had tried to disperse the crowd by squirting people with water from a high pressure water hose. One person was knocked down and trampled to death. The man was charged with an intentional homicide. The issue would be

____

____

whether or not the defendant had foreseen the death as a substantial certainty or merely as possible or probable.

(Note: Probably, in most cases of this sort, the decision would be that the defendant would have foreseen the result as a mere possibility or probability and thus would not be held criminally responsible for a degree of homicide that required intention.)

The test requires that the defendant himself must have foreseen the result as substantially certain, not that a reasonable man might have foreseen the result. Assume that a result was inevitable. A reasonable person would have foreseen it as a substantial certainty. Yet, if the defendant himself had not foreseen it as a substantial certainty, it cannot be said that the defendant had intended the result. The issue is not what the defendant should have foreseen--but what the defendant actually had foreseen. If a defendant had not foreseen a result as a substantial certainty, he may have been stupid, but he cannot be said to have intended the result.

Gray wanted to make his enemy "a little sick" so that the enemy would have to break a date with Gray's girl. Gray put some poison into his enemy's coffee, and the enemy died as a result. A normal, reasonable, knowledgeable person would have foreseen that the amount of poison used would kill the victim. Gray honestly had thought that it was just enough to make the victim "a little sick."

He may have been stupid, but Gray hadn't intended to cause death because ______________________________

____

he had not foreseen death as a substantial certainty.

White wanted to kill his enemy by poisoning him. He was in such a hurry to put the poison into the coffee that he spilled most of the poison on the floor. He thought that what was left wasn't enough to do the job, but he hopefully put what was left of the poison into the coffee anyway. His victim had a weak constitution and died. Could the defendant be held to have intended the death?_______ Explain:_____________________________

____

Yes. He had done the act in order to cause the death.

(Note: If you are bothered because the defendant hadn't foreseen the result as substantially certain but only as a mere possibility, remember the two ways to prove intention:

1. Show that the defendant had done the voluntary act in order to cause the criminal result; or
2. Show that the defendant himself had foreseen with substantial certainty that his voluntary act would cause the criminal result, in light of circumstances the defendant believed to be true. This case illustrates #1.)

The second test is whether the defendant had foreseen with substantial certainty that his voluntary conduct would cause the criminal result, in light of circumstances that the defendant believed to be true. That the circumstances must be taken as the defendant believed them to be is illustrated by the following three examples:

> If a man put a white powder into his wife's coffee, and the white powder was sugar, you would infer that the husband probably intended to sweeten the coffee.
>
> If the powder were cyanide, you would infer that the husband probably intended to kill his wife.
>
> If a man put a white powder into his wife's coffee, believing that it was sugar, but actually it was cyanide, he probably intended to sweeten the coffee, not to kill the wife.

In this third case the defendant would find it most difficult to prove that he hadn't intended death unless he were allowed to show that he had thought the powder was sugar. Therefore, the test is applied in light of circumstances that the defendant had believed to be true at the time of the event.

Notice how this principle is applied to cases involving the first test for intention--doing the act in order to cause the result.

A traveller in a railway station picked up and walked off with the suitcase of another passenger by mistake, thinking that it was his own. He was charged with larceny, "the felonious taking and carrying away of the personal property of another, with intent to permanently deprive." The defendant should be allowed to introduce evidence tending to prove that he had thought the suitcase was his own because ____________________

____

____

____

the definition of the crime requires that the defendant have intended to deprive another. Therefore, evidence of his concept of the facts (suitcase was his own) is necessary in order to determine what his actual intention had been.

Now notice that the principle also applies to cases which involve the second test for intention: where the defendant had foreseen the result as a substantial certainty.

Suppose that the man who killed several people when he threw a bomb into a crowd to disperse them had mistakenly thought that the bomb was just a toy which would make a loud noise and produce a lot of smoke. Should the defendant be allowed to introduce evidence of his mistaken concept?_______

Explain:____

____

____

____

Yes. Since he hadn't done the act in order to cause death, his intention would have to be proved by the second test, showing that he had actually foreseen the deaths as substantially certain. If he had thought that the bomb was a toy he would not have foreseen the deaths at all.

Consider this definition of burglary:

> . . .the breaking and entering of the dwelling of another in the nighttime with intent to commit a felony therein. . . .

The defendant must have intended to break and enter, and further, the definition specifically states that he must have broken and entered with the intention of committing a felony in the dwelling. The term "specific intent" is frequently used to refer to an intention specifically mentioned in the definition of the crime--"intent to commit a felony therein." Specific intent, of course, may be tested by either of the two tests for intention which you have learned.

A residence was on fire. A fireman chopped the door down with an ax, ran to the second story, grabbed a baby out of its crib, and tossed it out of a window into an escape net below. The baby was severely injured in the fall and died soon after. Could the fireman be guilty of burglary?______ Explain:____________

____

____

No. The fireman had intended to break and enter, but he had not broken and entered with specific intent to kill the child, because his acts had not been done to cause the death of the child, nor would he have foreseen with substantial certainty, as he broke and entered, that death would result.

You recall that "larceny is the felonious taking and carrying away of the personal property of another with intent to permanently deprive."

Perkins' wife was about to have a baby at three o'clock in the morning. He couldn't start his own car, so without awakening his neighbor, he put his wife into the neighbor's car and drove her to the hospital. Could Perkins be guilty of larceny?________ Explain:______________________________________

____

____

____

No. Perkins had intended acts which resulted in taking and carrying away of his neighbor's car, but he hadn't done these acts with intent to cause permanent deprivation, nor had he foreseen permanent deprivation as a substantially certain result. He had intended to return the car-- to deprive only temporarily.

Intention refers to the criminal result. Motive refers to the purpose for accomplishing the criminal result. Motive is immaterial and thus "good motive" is no defense.

A father learned that his idiot son could not recover from a terminal disease. The boy was in agony, so the father gave him a lethal dose of poison. On a charge of homicide, the father argued that he had loved his son and hadn't intended to murder him, but rather had intended to end his agony. Could the defendant be held to have intended to kill his son?_______

Explain:____

____

Yes. The defendant had intended for his boy to die. Good motive (ending the agony, mercy killing) is immaterial and not a defense.

When you are confronted with an unfamiliar crime, how do you determine whether intention, recklessness, or criminal negligence is required? First, analyze the definition of the crime. In doing so you will find the following three generalities helpful:

1. The definition of some crimes by direct expression or strong implication indicates that only intention will suffice.
2. If the definition does not require intention, usually either intention or recklessness will suffice.
3. Most crimes are not satisfied by criminal negligence.

Second, check your judgment by precedent. Consider this definition:

> Whoever without lawful authority forcibly or secretly confines, imprisons, or kidnaps any person with intent to hold such person for ransom. . .shall be punished by death. . .or imprisonment for life. . . .

May the statute be satisfied by either intention or recklessness, or will only intention suffice?________________________________

Explain:____

____

only intention will suffice because the definition expressly and specifically calls for intention to hold for ransom.

Consider this definition of murder in the first degree:

> The unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed or any human being. . . .

Does the definition expressly require that the defendant have intended to cause death?________ Explain:______________________

____

No. The language of the statute doesn't include the word "intent" or "intention."

Would the statute be satisfied by either intention or recklessness or would only intention suffice?________________

____

____

only intention would suffice because the words "premeditated design to effect death" are strong implication of intention.

Now consider this definition of murder in the second degree:

> The unlawful killing of a human being when perpetrated by any act imminently dangerous to another, and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual. . . .

Does this definition require that the defendant have intended to cause death?_________ Explain:_______________________________

____

No. The words "without any premeditated design to effect the death of any particular individual" negate rather than imply the need for intention.

What mental elements would you predict would satisfy the statute?____

Explain:____

____

either intention or recklessness, but not criminal negligence. If the definition does not require intention, usually either intention or recklessness will suffice, and most crimes are not satisfied by criminal negligence.

How would you check your prediction?________________________

precedent

SUMMARY OF GENERAL PRINCIPLES

I. An act
    A. Voluntary conduct
    B. Causation
    C. Criminal result
II. Mental element
    A. Intention

There are two tests for intention, either one of which will satisfy the requirement:

1. The defendant must have done the voluntary act in order to cause the criminal result; or

2. The defendant himself must actually have foreseen with substantial certainty that his voluntary conduct would cause the criminal result, in light of circumstances the defendant believed to be true.

* * *

1. The definition of some crimes by direct expression or strong implication indicates that only intention will suffice.

2. If the definition does not require intention usually either intention or recklessness will suffice.

3. Most crimes are not satisfied by criminal negligence.

George drove his car at 80 mph through a guard rail and over an embankment in an attempt to commit suicide. The guard rail was broken, the car demolished, but George was only injured. He was charged with a crime based upon the intentional injury of public property. How would you decide the case?

Consider each general principle in turn. Determine if the principle is satisfied by the facts, and proceed to the next principle. After you have finished, compare your answer with the one which follows.

The general principles of criminal responsibility require that the defendant's voluntary conduct must have been the proximate cause of a criminal result, accompanied by a mental element--the defendant must have intended the criminal result or have been reckless or criminally negligent relative to the criminal result. The requirements of "voluntary conduct" and "criminal result" are obviously satisfied by facts and thus do not require discussion.

The next requirement concerns causation. The defendant's conduct must have been the proximate cause of the criminal result. The test is whether the defendant's act had played an appreciable and substantial part in producing the result. Driving the car certainly had played an appreciable and substantial part in the destruction of the guard rail, because the act alone caused the criminal result. Therefore the act of the defendant was the proximate cause of injury to public property.

The final problem concerns the mental element. The definition of the crime requires an intentional injury to public property. Recklessness or criminal negligence will not suffice. There are two tests for intention, either of which will satisfy the requirement:

1. The defendant must have done the voluntary act in order to cause the criminal result. In this case, the defendant had done the act in order to commit suicide. He probably hadn't considered injury to public property, nor had he driven his car in order to injure the property. This test is not satisfied.

2. The defendant himself must actually have foreseen with substantial certainty that his voluntary act would cause the criminal result, in light of circumstances he believed to be true. The defendant can deny that his purpose was to injure the property; he can claim that he was thinking only of suicide; but he can't deny that breaking through the guard rail was necessary for his ultimate purpose of suicide. Therefore, he must have foreseen injury to the property as inevitable--substantially certain. This test is satisfied.

Since all principles are satisfied by the facts the defendant could be held criminally responsible. Motive of suicide is immaterial.

Bruce, a student of hypnosis, had been told that a person might be induced under hypnosis to kill. Bruce personally believed that no one could be induced to kill while hypnotized. To test the proposition, he attempted to hypnotize a fellow student, Sam; then told him to kill two persons--a narcotics peddler (who had "hooked" Sam's younger sister) and a great humanitarian. Sam hadn't become hypnotized, however, and killed the peddler. Bruce was charged with murder in the first degree under the following statute:

> The unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed or any human being. . . .

How would you decide the case? Consider the general principles in turn, determine if the principle is satisfied by the facts, and then proceed to the next principle. After you have finished, compare your answer with the one which follows.

General principles of criminal responsibility require that the defendant's voluntary conduct was a proximate cause of a criminal result, accompanied by a mental element--the defendant must have intended the criminal result or have been reckless or criminally negligent relative to it. The requirements of "voluntary conduct" and "criminal result" are obviously satisfied and thus do not require discussion.

The next problem concerns causation. The defendant's conduct must have been a proximate cause of the criminal result.

The test is whether the voluntary act played an appreciable and substantial part in producing the criminal result. Death has been caused by an intervening force--the conscious, un-hypnotized act of Sam. When death is caused by such an intervening force, the act of the defendant may have been a proximate cause of the criminal result if it had set the intervening force in motion. Here, the act of the defendant (Bruce's attempt to hypnotize Sam) had not set the conscious act of Sam into motion. Sam had acted independently; thus, the act of the defendant had not played an appreciable and substantial part in the result and was not a proximate cause of the death.

(Note: Although the first point dealing with volition satisfied the definition, the requirement of causation is not satisfied, and the defendant could not be ehld criminally responsible. Therefore, no further discussion is necessary to solve the problem. But in the interest of completeness, continuity, and illustrating the pattern, the principle of intention will be discussed. Some professors prefer a discussion only to the point of solution. Others prefer a discussion of all principles and requirements.)

The final problem concerns the mental element. When the definition expressly or by strong implication requires intention, only intention will suffice. Here, the language "premeditated design to effect death" indicates that only intention will suffice. There are two tests for intention, either one of which will satisfy the requirement:

1. The defendant must have done the voluntary act in order to cause the criminal result. Bruce had hypnotized Sam to test a theory, not in order to kill the peddler. Thus, this test is not satisfied.

2. The defendant himself must actually have foreseen with substantial certainty that his voluntary conduct would cause the criminal result (peddler's death), in light of circumstances he believed to be true. Bruce had believed that no one could be induced to kill under hypnosis. Therefore, in light of circumstances as the defendant had believed them to be, he had not foreseen death as a substantial certainty. Thus, neither test for intention is satisfied.

The defendant is not criminally responsible for murder in the first degree because two general principles are not satisfied:

1. The act of the defendant was not a proximate cause of death, and

2. The statute under which the defendant was prosecuted requires intention and the defendant had not intended death.

(Note: The "good motive" of scientific research is immaterial.)

GENERAL PRINCIPLES

II. Mental Element
A. Intention or
B. Recklessness

You have just finished analyzing crimes in which voluntary conduct was a proximate cause of a criminal result and the mental element was intention. Now you will be concerned with crimes in which voluntary conduct was a proximate cause of a criminal result and the mental element is recklessness.

You recall that there are two tests for intention, either one of which will satisfy the requirement. However, recklessness involves three components, all three of which must be satisfied:

1. The defendant must have been under a legal duty to conduct himself in a reasonable fashion.

2. The defendant himself must actually have foreseen that his voluntary act possibly or probably would cause the criminal result, in light of circumstances the defendant believed to be true.

3. The defendant must have acted in an unreasonable fashion, considering the balance of potential benefit versus the risk of harm, in light of circumstances the defendant believed to be true.

We will not consider the first component--legal duty--in detail, and therefore will dispose of it immediately. Of course, the word "duty" refers not to a social obligation but to a __________ duty.

legal

People come into contact with each other in an infinite number of ways. Some involve a recognized legal duty, while others do not. A pat formula for "legal duty" is impossible. The recommended approach is precedent.

Since the study of the concept of "duty" would require a detailed analysis of a large number of cases rather than the introduction of new principles of law, we will not belabor the point. Rather, in all cases presented in this text you will assume that the requirement of a "legal duty" is satisfied.

The thing to remember is that the legal duty is a duty to conduct onesself in a ____________________________ fashion.

reasonable

The second component of recklessness is:

2. The defendant himself must actually have foreseen that his voluntary act possibly or probably would cause the criminal result, in light of circumstances the defendant believed to be true.

A mother bought some canned peas in a grocery, heated them, and served them to her family. The peas had been contaminated and one member of the family died. Since the contaminated condition of the peas had not been discernable to the mother, she had not been reckless because ______________

____

she had not foreseen the possibility or probability that her acts would cause death.

You recall that the test for intention concerned what the defendant himself actually had foreseen. Similarly, the test for recklessness concerns what the defendant himself actually had foreseen. The fact that he reasonably should have foreseen a result, or that a normal or reasonable man would have foreseen it, is not enough.

Suppose that the man who killed several people when he squirted the crowd with water from a high pressure hose in order to disperse them proved that he had not foreseen the risk of death. In a prosecution based upon recklessness, the state argued that any reasonable man would have foreseen the risk. Answer the argument: ____

____

____

____

The defendant could not have been reckless unless he himself actually had foreseen that his voluntary act would possibly or probably cause death. It is not enough to prove what a reasonable man would have foreseen. Therefore, the state's argument fails.

Since recklessness requires that the defendant himself actually must have foreseen that his voluntary act possibly or probably might cause the criminal result, in light of circumstances he had believed to be true, the defendant should be allowed to present evidence of his concept of the facts. (Same policy as intention: sugar/cyanide case, p. IN 10)

A guest complained of a headache and asked his host for a drink of water. Trying to be helpful, the host dissolved three aspirins in the water he gave to the guest. The guest drank the water and died soon after from an allergic reaction. The host was charged with murder. The defendant had not been aware that the guest had any allergies. The defendant had not been reckless because in light of circumstances he believed to be true, he had not foreseen the death as possible or probable.

You recall that the requirement for intention was that the defendant *himself* must have foreseen the result as a *substantial certainty* in light of circumstances the defendant believed to be true. The requirement for recklessness is that the defendant *himself* must have foreseen the result as merely *possible or probable*, in light of circumstances the defendant believed to be true. Substantial certainty implies inevitability. The words "possible or probable" imply mere risk.

The person who killed several people when he squirted a crowd with water from a high pressure hose in order to cause them to disperse was held not to have *intended* the deaths and injuries because ____

____

he had not foreseen the deaths as substantially certain or inevitable.

Suppose the same man was charged with a degree of homicide which could be satisfied by recklessness. What would the issue be?

____

____

whether or not the man actually had foreseen that death was possible or probable.

The third component of recklessness is:

3. The defendant must have acted in an unreasonable fashion, considering the balance of potential benefit versus the risk of harm, in light of circumstances the defendant believed to be true.

If the defendant himself had not foreseen the result as possible or probable the defendant could not have been reckless. If the defendant had foreseen the result as possible or probable, he still would not have been reckless unless his conduct was unreasonable. Even though a defendant may have foreseen the result as a possible or probable consequence of his act, it would not always be considered unreasonable for him to have done the act. Many acts are done and are accepted because the potential benefits overbalance the risk of harm.

A husband exceeded the speed limit while rushing his wife to the hospital, even though he had foreseen the possibility of an accident and harm. If the wife were bleeding to death, the husband's act would not have been unreasonable because __________

____

the potential benefits overbalance the risk of harm.

Suppose a wounded soldier had to have a blood transfusion immediately or he would surely die. Although the Army physician had no way of determining the soldier's blood type on the spot, the doctor gave the soldier an emergency transfusion and the soldier died. Was the doctor's act unreasonable?_______

Explain:____

____

No. Even though the physician had foreseen the possibility of death, the potential benefits to the soldier outweighed the risk of harm.

Determination of the "reasonableness" of the defendant's conduct is made in light of circumstances the defendant himself believed to be true.

A hunter's wife was bitten by a harmless snake. The hunter thought that the snake was poisonous and that the wound should be bled. His only instrument was a dirty hunting knife. Although he foresaw the possibility of infection, he cut and bled the wound anyway. His act was not unreasonable because ____________________

____

____

in light of circumstances the defendant himself had believed to be true (poisonous snake), the potential benefits probably overbalanced the risk of harm.

A four-year-old boy watched as his father mixed some poisons to make insecticide. Since the father was expecting an important business call, he left the room to answer the phone, hoping that the boy would stay out of the poisons. The boy, however, ate some of the poison and died. Was the father reckless?________ Explain, considering all three components of recklessness.

____

____

____

____

____

____

____

Yes. The first component, legal duty, is assumed. The second component is that the defendant himself must actually have foreseen the death as a possible or probable result of leaving his son in the presence of poisons. That the father had foreseen such a result is evident by the fact that he had "hoped" the boy would not get into the poisons. The third component is that the defendant's acts must have been unreasonable, considering the balance of potential benefit v. the risk of harm, in light of circumstances the defendant believed to be true. The father's act of leaving the son in the presence of poisons was unreasonable because the potential benefit from an important business telephone call would not justify the risk of his son's death. All three components are satisfied and the defendant is held to have been reckless.

Now suppose that instead of receiving a business call the father had heard his older daughter, who was cooking dinner, cry, "Help! Help! My dress is on fire!" Again, the father hoped that the boy would stay out of the poisons and rushed to his daughter's rescue. The son ate poison and died. Was the father reckless?_____

Explain in full:____

____

____

____

No. The first component, legal duty, is assumed. The second component is that the defendant himself must have foreseen the possibility or probability of death. That the father had foreseen sucn a result is evident by the fact that he had "hoped" the boy would not get into the poisons. The third component is that the defendant's act must have been unreasonable, considering the balance of potential benefit v. risk of harm, in light of the circumstances the defendant believed to be true. In this case, the risk of death to the defendant's son was balanced by the potential benefit of saving his daughter. Therefore, the defendant's act was not unreasonable and he is held not to have been reckless.

Suppose the daughter's dress was just scorched a bit and the defendant had been mistaken in believing that she was in immediate danger. Would this change the result?_________ Explain:___________

____

____

No. The result would not change because facts are taken as the defendant himself believed them to be.

Suppose the daughter always exaggerated and the father should have known that she wasn't in immediate danger. Would this change the result?______ Explain:____________________________

____

____

____

No, because the facts are taken as the defendant himself believed them to be, not as he reasonably should have believed them to be, or not as a reasonable man would have believed them to be.

Recklessness need not be related to a particular victim but may be related to a general class of victims. The person who killed people by recklessly squirting water from a high pressure hose into a crowd in order to disperse them could have argued that his recklessness was not directed against any particular person. His argument is immaterial because recklessness need not be related to a particular victim but may be related to

____

a general class of victims (persons in the crowd).

A man drove 70 mph on a busy street to see how fast his new car would go. He hit and killed a pedestrian. He was charged with a degree of homicide that could be satisfied by recklessness. He argued that he hadn't foreseen the possibility or probability of death to that particular victim and so had not been reckless relative to that particular victim. Answer him:

____

____

____

His argument is immaterial because recklessness need not be related to a particular victim but may be related to a general class of victims (people in the street).

You recall that most crimes require intention, recklessness, or criminal negligence. You recall also that the suggested procedure to determine which is required is an analysis of the definition of the crime and of precedent. Further, you recall the three generalities: (IN 16)

1. The definition of some crimes by direct expression or strong implication indicates that only intention will suffice.
2. If the definition does not require intention, usually either intention or recklessness will suffice.
3. Most crimes are not satisfied by criminal negligence.

Consider this statute:

> Whoever wantonly destroys, defaces, mars or injures any schoolhouse or church shall be punished by imprisonment not exceeding one year.

Suppose a man intentionally set fire to a school. The statute provides that the defendant must have acted "wantonly." Could the defendant be criminally responsible under this statute?

______ Explain:____

____

Yes. The word "wantonly" is ambiguous and might be satisfied by either intention or recklessness, so obviously intention would suffice.

Suppose a man started a fire in the school yard to roast hot dogs. His date warned him that if the wind shifted just a little the dry leaves on the ground could catch fire and endanger the school. He replied, "So what!" The wind shifted and the school was burned. Would these facts satisfy the components of intention?________ Why?____

____

No. The defendant hadn't started the fire in order to burn the school nor had he foreseen the result as a substantial certainty.

Would these facts satisfy the components of recklessness?_____

Why?____

Yes. The first component, legal duty, is assumed. The second component is that the defendant himself must actually have foreseen that his voluntary act possibly or probably would cause the criminal result, in light of circumstances the defendant believed to be true. The conversation between the parties is evidence that the defendant had foreseen the possibility or probability of his fire's igniting the school. The third component is that the defendant must have acted in an unreasonable fashion, considering the balance of potential benefit v. risk of harm, in light of facts the defendant believed to be true. His conduct was unreasonable because the potential benefit of cooking hot dogs was trivial compared to the serious consequences of burning a school. All of the components of recklessness are satisfied, and the defendant's conduct was held to have been reckless.

Would recklessness satisfy the statute?______ Explain:

____

____

____

Probably. The word "wantonly" is ambiguous. The definition does not, by expression or strong implication, require intention. Usually, then, either intention or recklessness will suffice.

How would you check your conclusion?________________________

by precedent

Would criminal negligence satisfy the statute?__________

Explain:____

____

____

Probably not. Most crimes are not satisfied by criminal negligence.

A check of precedent would show that the general presumption prevails. Therefore, this statute is an example of one which does not demand intention, but may be satisfied by either intention or recklessness, though probably not by criminal negligence.

SUMMARY OF GENERAL PRINCIPLES

I. An act
    A. Voluntary conduct
    B. Causation
    C. Criminal result
II. Mental element
    A. Intention or
    B. Recklessness

Recklessness involves three components, all three of which must be satisfied:

1. The defendant must have been under a legal duty to conduct himself in a reasonable fashion.

2. The defendant himself must actually have foreseen that his voluntary act possibly or probably would cause the criminal result, in light of circumstances the defendant believed to be true.

   (This is similar to intention in that the defendant himself must actually have foreseen the result. This is different from intention as to the degree of foreseeability: substantial certainty v. possible or probable.)

3. The defendant must have acted in an unreasonable fashion, considering the balance of potential benefit v. the risk of harm, in light of circumstances the defendant believed to be true.

* * *

Recklessness need not be related to a particular victim but may be related to a general class of victims.

* * *

1. The definition of some crimes by direct expression or strong implication indicates that only intention will suffice.

2. If the definition does not require intention usually either intention or recklessness will suffice.

3. Most crimes are not satisfied by criminal negligence.

Mr. Smith, captain of a deep sea fishing charter boat, had been losing customers to Captain Jones. One day when Capt. Jones had a charter and Capt. Smith did not, the weather bureau announced that a hurricane was due to hit the area shortly. Capt. Jones considered that he had time for one or two more trips. In order to discredit Capt. Jones in the eyes of the public, Smith drained gas from Jones' tank, hoping that Jones would become stranded offshore. Jones' boat ran out of gas offshore and was caught in the hurricane. He was unable to radio for help because his radio had been out of order for more than a week. In the storm, Fisherman Bailey was washed overboard. Capt. Jones jumped after him to save him, but both men were drowned. Fisherman Collins took command and ordered Fisherman Davis to throw out another sea anchor. Davis refused. When angry words and blows followed, Collins knocked Davis overboard and he drowned. Capt. Smith was charged with murder in the first degree of Capt. Jones and Fishermen Bailey and Davis under the following statute:

> The unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed or any human being. . .shall be murder in the first degree. . . .

Consider Smith's criminal responsibility for each death. Be sure to apply the mental element required by the statute.

General principles of criminal responsibility require that the defendant's voluntary conduct be the proximate cause of a criminal result, accompanied by a mental element--the defendant must have intended the criminal result or have been reckless or criminally negligent relative to the criminal result.

The requirements of voluntary conduct and criminal result are obviously satisfied and do not require discussion.

One problem concerns causation. The defendant's conduct must have been a proximate cause of the criminal result. The test is whether Smith's draining of the tank had played an appreciable and substantial part in the deaths.

When death was caused by an intervening force, the defendant's act played an appreciable and substantial part if it had set the intervening force in motion and if the occurrence of the result was a risk associated with the intervening force. Smith's act of draining the gas was not the sole cause of death, but it had set in motion the intervening force of the boat's being stranded in the path of a hurricane. The issue in each instances, then, is whether the occurrence of each death was a risk associated with the hurricane. Obviously, Bailey's having been washed overboard is a risk attendant with a boat's being caught in a hurricane. Capt. Jones' attempting rescue of a person overboard is also an attendant risk. Thus, the act of the defendant was a proximate cause of the deaths of Capt. Jones and Fisherman Bailey. Davis' death was not caused by the hurricane, but by a blow from Collins, and such a blow was not a risk attendant to a boat's being caught by a hurricane. Smith's action was not a proximate cause of the death of Davis.

The final requirement under the statute defining murder in the first degree concerns the mental element. If the definition by expression or strong implication requires intention, only intention will suffice. The words "premeditated design to effect the death of the person killed" imply that only intention will suffice. There are two tests for intention, either one of which will satisfy the requirement:

1. The defendant must have done the voluntary act in order to cause the criminal result. The defendant drained the tank, not in order to kill anyone, but to discredit Capt. Jones.

2. The defendant himself must have foreseen with substantial certainty that his voluntary conduct would cause the criminal result, in light of circumstances the defendant believed to be true. The defendant had known a hurricane was coming and he had known a risk of some danger was involved, but he had only expected to discredit Capt. Jones, not to eliminate him. Therefore, the facts indicate that he hadn't foreseen death as substantially certain.

   One might argue that any reasonable man would have foreseen death as substantially certain, but this is immaterial, for the test for intention is what the defendant himself actually had foreseen, not what a reasonable man would have foreseen.

   Neither test is satisfied. The defendant hadn't intended the deaths.

Smith is not guilty of murder in the first degree for the death of Fisherman Davis because his act was not a proximate cause of Davis' death and because he hadn't intended Davis' death. The defendant is not guilty of murder in the first degree of Capt. Jones and Fisherman Bailey, even though his acts were proximate causes of their deaths, because he had not intended their deaths.

Suppose the defendant in the last case were charged with murder in the second degree under the following statute:

> When perpetrated by any act imminently dangerous to another, and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual, it shall be murder in the second degree. . . .

Consider the defendant's criminal responsibility for each death.

The discussion as to voluntary conduct which was the proximate cause of the criminal result is the same as in the previous question (RE 27).

The final problem concerns the mental element under the statute defining murder in the second degree. The wording of the statute, ". . .without any premeditated design to effect the death of any particular individual. . . .," indicates that intention is not required; recklessness will suffice. Recklessness involves three components, all three of which must be satisfied:

1. The defendant must have been under a legal duty to conduct himself in a reasonable fashion. Assumed.

2. The defendant himself must actually have foreseen that his voluntary act possibly or probably would cause the criminal result, in light of circumstances the defendant believed to be true.

   Since the defendant had known that a hurricane was coming and, assuming that he had known Capt. Jones' radio was broken, most jurors probably would be convinced that the defendant had foreseen death of persons on the boat as a possible or probable result (not substantially certain).

   If the defendant could prove that he had thought Capt. Jones' radio was working so that the Coast Guard could have been called, the jurors could easily believe that the defendant himself hadn't actually foreseen death as possible or probable.

   Assuming that the defendant had known that Capt. Jones' radio was broken, and assuming that the jury believed that Smith had foreseen death as possible or probable, the second component of recklessness would be satisfied.

3. The defendant must have acted in an unreasonable fashion considering the balance of potential benefit v. the risk of harm, in light of circumstances the defendant believed to be true.

> Smith could not justify having drained the tank in order to discredit Capt. Jones. The act was unreasonable.

The defendant is not criminally responsible for murder in the second degree of Fisherman Davis, as developed in the previous discussion (RE 28). The defendant is criminally responsible for murder in the second degree of Captain Jones and Fisherman Bailey because all requirements of the crime are satisfied.

GENERAL PRINCIPLES

II. Mental element
  A. Intention
  B. Recklessness
  C. Criminal negligence

You have just finished analyzing crimes in which voluntary conduct was a proximate cause of a criminal result and the mental element was recklessness. Now you will be concerned with crimes in which voluntary conduct was a proximate cause of a criminal result and the mental element is criminal negligence.

You will recall that there are three components for recklessness, all of which must be satisfied. Similarly, criminal negligence involves three components, all three of which must be satisfied:

1. The defendant must have been under a legal duty to conduct himself in a reasonable fashion.

2. A reasonable man would have foreseen that his voluntary act possibly or probably would cause the criminal result, in light of circumstances a reasonable man would have believed to be true.

3. The defendant must have acted in an unreasonable fashion, considering the balance of potential benefit versus the risk of harm, in light of circumstances a reasonable man would have believed to be true.

As in recklessness, the word "duty" refers not to a social obligation, but to a legal duty. It is assumed that this requirement is satisfied in all cases presented in this text.

The second component of criminal negligence requires that a reasonable man (not the defendant himself) would have foreseen that the voluntary act possibly or probably would cause the criminal result, in light of circumstances a reasonable man (not the defendant himself) would have believed to be true. You will notice that in criminal negligence a "reasonable man" is substituted twice for the word "defendant" as used in the components for recklessness. Consider the first substitution.

A person squirted water from a high pressure hose into a crowd in order to disperse the people. A member of the crowd was knocked down by the water and trampled to death. The state could not prove that the defendant had actually foreseen death as a possible or probable result, so the state could not prove that the defendant was reckless. The person was charged with a degree of homicide that could be satisfied by criminal negligence. What would the issue be?____

____

whether or not a reasonable man (not the defendant) would have foreseen death as a possible or probable result.

Consider the second substitution of the "reasonable man" for the "defendant." Recklessness is determined in light of facts the defendant had believed to be true. If the person squirted a crowd with a hose in the mistaken belief that the pressure was only the same as in a common garden hose, the person could not have foreseen death as a possible or probable result, in light of circumstances he had believed to be true. Therefore, due to a mistake of fact, he had not been reckless.

Criminal negligence, on the other hand, is determined in light of circumstances a reasonable man would have believed to be true. Suppose the person mistakenly had believed the pressure was low, but a reasonable man would have believed that the pressure was high. Might the person have been criminally negligent?_______

Explain:____

____

____

Yes. In light of circumstances a reasonable man would have believed to be true (high pressure), a reasonable man might have foreseen death as a possible or probable result.

Now assume that the person mistakenly had believed that the pressure was low and a reasonable man also mistakenly would have believed that the pressure was low. Could the state prove that the defendant had been criminally negligent?______

Explain:____

____

____

No. In light of facts a reasonable man would have believed to be true (low pressure), a reasonable man would not have foreseen death as a possible or probable result.

Since criminal negligence is determined in light of the facts a reasonable man would have believed to be true, _mistake of fact_ is not a defense to criminal negligence unless the defendant were mistaken and a ________________________ man also would have been mistaken.

reasonable

Mistake of fact of such a nature that the criminal results would not have been foreseen as possible or probable would be a defense to recklessness if ____

____, and a defense to criminal negligence if ____

____

the defendant were mistaken.

the defendant were mistaken and a reasonable man also would have been mistaken.

The third component of criminal negligence is that the defendant must have acted in an unreasonable fashion, considering the balance of potential benefit v. the risk of harm, in light of circumstances a reasonable man would have believed to be true. The test for unreasonable conduct for criminal negligence is based upon circumstances a reasonable man (not the defendant) would have believed to be true.

An employee felt that he and his wife were obliged to attend a party given by his boss. The employer lived by a treacherous mountain road. The employee knew that the brakes on his car were worn and somewhat dangerous, but he thought that they would last for another week or two. As the employee and his wife were on their way to the employer's party, the brakes on the car failed, the car crashed, and the employee's wife was killed. The employee was charged with a degree of homicide that required recklessness. Would his conduct be considered unreasonable?______ Explain:______________________________

No. The defendant must have acted in an unreasonable fashion, considering the balance of potential benefit v. risk of harm, in light of circumstances the defendant believed to be true. Since the defendant had believed that the brakes would be adequate for a week or two, the risk of harm, though present, was small. The employee's benefit of good relations with his employer was important. Due to a mistake of fact by the defendant as to the brakes, his act was reasonable and he was not reckless.

Suppose in the last case the defendant hadn't believed that the brakes would fail, but a reasonable man would have believed that the brakes would fail. The defendant was charged with a degree of homicide that could be satisfied by criminal negligence. Would his conduct be considered unreasonable?_____

Explain:____

____

____

____

____

____

____

____

Yes. The defendant must have acted in a reasonable fashion, considering the balance of potential benefit v. risk of harm, in light of circumstances a reasonable man would have believed to be true. In light of the fact that the brakes were worn and might fail, a reasonable man would have known that the risk of danger was great. Business rewards probably wouldn't justify the risk. The defendant's conduct was unreasonable.

Now assume that a reasonable man would have believed that the brakes would hold. The defendant's conduct would not have been unreasonable, as related to criminal negligence, because

____

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____

in light of circumstances a reasonable man would have believed to be true (brakes would hold), the act would have been reasonable.

A husband noticed a bulge on the tire of his car, but it didn't occur to him that the tire was weak and might blow out. A reasonable man would have been apprehensive. The husband took his wife for a joy ride at excessive speed over mountain roads. The bulging tire blew out, the car went over a cliff, and the man's wife was killed. On a manslaughter charge, could the state prove that the defendant's conduct had been criminally negligent?

_______ Explain:____

Yes. The first component, legal duty, is assumed. The second component is that a reasonable man would have foreseen that his voluntary act (joy riding) possibly or probably would cause the criminal result (death), in light of circumstances a reasonable man would have believed to be true (a weak tire). The defendant's mistake of fact (failure to realize that the tire might blow out) is immaterial and no defense. The third component is that the defendant must have acted in an unreasonable fashion, considering the balance of potential benefit (joy ride) v. the risk of harm (death), in light of circumstances a reasonable man would have believed to be true. Since the benefit wouldn't justify the risk, the act of the defendant had been unreasonable, and the defendant was criminally negligent.

A husband believed that his wife was bleeding to death. As he carried her to the car he noticed a bulge on the tire, but in the stress of the situation it didn't occur to him that the tire was weak and might blow out. A reasonable man, however, would have been apprehensive. As he drove his wife to the hospital, the tire blew out, the car turned over, and the wife was killed. On a manslaughter charge, could the state prove that the defendant's conduct had been criminally negligent?______ Explain:______________

____

(next page)

CN 12

No. The first component of criminal negligence, legal duty, is assumed. The second component is that a reasonable man would have foreseen the risk of death as a possible or probable result of the defendant's conduct. Here, the defendant hadn't foreseen the risk, but a reasonable man in his place probably would have, for it is common knowledge that a tire with a bulge may blow out and cause a fatal accident. Thus, this component would be satisfied. The third component is that the defendant must have acted in an unreasonable fashion, considering the balance of potential benefit v. the risk of harm, in light of circumstances a reasonable man would have believed to be true. The potential benefit of saving the wife's life was probably worth the risk and a reasonable man would have done it; thus, the act was not unreasonable.

Civil liability for damages may be based upon "ordinary negligence." Criminal responsibility requires "greater" negligence. This concept of "greater" negligence is expressed by different phrases such as culpable negligence, gross negligence, or criminal negligence (the phrase used in this text).

There is no pat formula to distinguish criminal negligence from ordinary negligence, but two generalizations are helpful. The first involves a relationship between duty and reasonable conduct. A duty may be of a high or a low degree. A person's conduct may almost conform to the degree of "reasonableness" required or may miss by a wide margin. The higher the degree of duty and the wider the margin by which the defendant's conduct failed to conform to the reasonable standard, the more likely the courts will be to consider his conduct to have been _______________ negligence.

criminal

A physician who knew that he was scheduled to operate the next morning drank all night. The next morning he operated while still somewhat intoxicated. He cut an artery and his patient died. The physician would probably be considered criminally negligent because the physician owed a high degree of ____________ to his patient and his conduct failed by a wide margin to meet the required ______________ ____ ________________________.

duty

degree of "reasonableness"

The second generalization relates to foreseeability. Usually, foreseeability of a general risk of danger (not a specific harm) is sufficient for "ordinary negligence" in civil actions. Although courts disagree, some require that for criminal responsibility, the specific harm (not just a risk of general danger) must have been reasonably foreseen.

Suppose that when the man squirted the crowd with water from a garden hose, water squirted down one person's throat and strangled him. A reasonable man would have foreseen that some person would be hit by the water. The man was charged with manslaughter based upon criminal negligence, in a court which requires that the specific harm must have been foreseen. The issue would be whether or not ______________________________

____

____

a reasonable man would have foreseen the specific harm of death as a possible or probable result of squirting water into the crowd.

You recall that recklessness need not be related to a particular victim, but rather may be related to a general class of victims. The same principle applies to criminal negligence.

As a person drove his car in a criminally negligent manner down a crowded street, he hit and killed a pedestrian. He was charged with a degree of homicide that could be satisfied by criminal negligence. He argued that a reasonable man would not have foreseen the possibility or probability of death to the particular victim. Answer him:________________________________

____

____

____

His argument is immaterial because criminal negligence need not be related to a particular victim, but may be related to a general class of victims (people on the street).

You will recall that the judgment of whether intention, recklessness, or criminal negligence is required by a given crime is made by an analysis of the definition of the crime and by precedent. You also recall three generalities: (IN 16)

1. The definition of some crimes by direct expression or strong implication indicates that only intention will suffice.
2. If the definition does not require intention, usually either intention or recklessness will suffice.
3. Most crimes are not satisfied by criminal negligence.

Since the usual presumption is that a crime requires either intention or recklessness, if the legislators want criminal negligence to suffice they usually will provide expressly for criminal negligence in the statute. For example:

1. Manslaughter. The killing of a human being by the act, procurement or culpable negligence of another. . . .
2. Punishment for culpable negligence. Whoever through culpable negligence, or reckless disregard for the safety of others, inflicts any personal injury or injuries upon another. . . .

SUMMARY OF GENERAL PRINCIPLES

I. An act
  A. Voluntary conduct
  B. Causation
  C. Criminal result
II. Mental element
  A. Intention
  B. Recklessness
  C. Criminal negligence

Criminal negligence involves three components, all three of which must be satisfied:

1. The defendant must have been under a legal duty to conduct himself in a reasonable fashion.

2. A reasonable man (not the defendant himself) would have foreseen that his voluntary act possibly or probably would cause the criminal result, in light of circumstances a reasonable man (not the defendant) would have believed to be true.

3. The defendant must have acted in an unreasonable fashion, considering the balance of potential benefit v. the risk of harm, in light of circumstances a reasonable man (not the defendant) would have believed to be true.

* * *

Distinction between criminal negligence & ordinary negligence:

1. Criminal negligence implies a relatively higher duty and conduct which failed by a relatively wider margin to meet the required degree of "reasonableness." (CN 14)
   Frequently courts require reasonable foreseeability of the specific criminal result (ex: death) for criminal negligence.
2. Ordinary negligence need not be related to a particular victim, but may be related to a general class of victims.

* * *

1. The definition of some crimes by direct expression or strong implication indicates that only intention will suffice.

2. If the definition does not require intention usually either intention or recklessness will suffice.

3. Most crimes are not satisfied by criminal negligence.

CN 20

Two prisoners shared a cell and each had been sentenced to execution. Jones was an elderly, experienced, professional criminal. Smith was a sensitive, withdrawn, unstable younger man who was growing more and more despondent and lethargic. In an effort to arouse some spirit in the boy, Jones said, "They shouldn't electrocute you. What good will it do besides giving them satisfaction? Do you know what you should do? You should hang yourself tonight so that they'll never have the satisfaction!" Much to Jones' surprise, Smith hung himself that night. Jones was charged with murder in the first degree. Would Jones be guilty of murder in the first degree under the following statute:

> The unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed or any human being. . .shall be murder in the first degree.

Be sure to apply the mental element required by the statute.

General principles of criminal responsibility require that the defendant's voluntary conduct be a proximate cause of the criminal result, accompanied by a mental element--the defendant must have intended the criminal result or have been reckless or criminally negligent with respect to it.

The requirements concerning "voluntary conduct" and "criminal result" are obviously satisfied and do not require discussion.

The next problem concerns causation. The defendant's voluntary conduct must have been a proximate cause of the criminal result. The test is whether the defendant's act played an appreciable and substantial part in the result. Where an intervening force produced the result, the defendant's act played an appreciable and substantial part if it had set the intervening force in motion and the occurrence of the criminal result was a risk associated with the intervening force. The suggestion of the defendant set in motion the intervening force (Smith's hanging) and of course, death is an attendant risk; thus, the act of the defendant played an appreciable and substantial part and was a proximate cause of death.

The final problem concerns the mental element, under the statute defining murder in the first degree. When the definition expressly or by strong implication requires intention, only intention will suffice. The words ". . .when perpetrated from a premeditated design to effect death. . . ." strongly imply that intention is required. There are two tests for intention, either one of which will satisfy the requirement:

1. The defendant had done the act in order to cause the criminal result. The defendant had made the suggestion to arouse Smith from his despondency and lethargic state, not to kill him.

2. The defendant himself must have foreseen with substantial certainty that his act would cause the criminal result, in light

of circumstances known to the defendant. The defendant had known that Smith was sensitive and perhaps reasonable should have known that he would commit suicide. However, for intention the test is what the defendant actually had foreseen, not what a reasonable man would have foreseen, and a jury probably would believe that the defendant had not foreseen death as substantially certain. Thus, intention is not satisfied by either requirement.

Therefore, even though the defendant's voluntary conduct was a proximate cause of death, Jones is not guilty of murder in the first degree because he had not intended to cause death.

Now consider Jones' criminal responsibility under the statute defining murder in the second degree:

> When perpetrated by any act imminently dangerous to another, and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual, it shall be murder in the second degree. . . .

As shown in the previous discussion, the defendant's voluntary conduct was the proximate cause of the criminal result. The final problem involves the mental element, under the statute defining murder in the second degree. If the definition of the crime does not require intention, usually either intention or recklessness will suffice. This statute specifically states that intention is not necessary; therefore, recklessness will suffice.

The first component of recklessness, legal duty, is assumed. The second component is that Jones himself must actually have foreseen the possibility or probability of death in light of circumstances he believed to be true. The defendant had known that Smith was sensitive and a reasonable man in his place might have foreseen that Smith would take Jones' suggestion and hang himself. However, the test is what the defendant himself had foreseen, not what a reasonable man would have seen as possible or probable. The defendant had wanted to arouse Smith from his despondency and so obviously he had not foreseen the suicide. Thus, the defendant had not been reckless.

(Note: Since the second component of recklessness is not satisfied, the defendant could not be criminally responsible under the statute defining murder in the second degree. Therefore, no further discussion is necessary to answer the problem. But in the interest of completeness, continuity, and illustrating the pattern, the third component of recklessness will be discussed.)

The third component is that Jones must have acted in an unreasonable fashion, considering the balance of potential benefit v. the risk of harm, in light of circumstances the defendant believed to be true. According to the defendant's perception of the facts, the risk of harm was negligible and he had thought that Smith would be aroused from his despondency. Thus, on this basis also, Jones' act had not been unreasonable.

Even though the defendant's voluntary conduct was a proximate cause of death, the defendant is not criminally responsible for murder in the second degree because he was not reckless--he hadn't foreseen death as possible or probable and his conduct had not been unreasonable.

Now consider the defendant's criminal responsibility under the statute defining manslaughter:

> The killing of a human being by the act, procurement or culpable negligence of another, in cases where such killing shall not be justifiable or excusable homicide. . . .

As shown in the previous discussion, the defendant's voluntary conduct was the proximate cause of a criminal result. The final requirement concerns the mental element, under the statute defining manslaughter. Most crimes may not be satisfied by criminal negligence. If the legislators intend criminal negligence to suffice, they will usually expressly provide for criminal negligence in the statute. This statute specifically provides that criminal (or culpable) negligence will suffice.

The first component, legal duty, is assumed. The second component is that a reasonable man would have foreseen that his voluntary act possibly or probably would cause death, in light of circumstances a reasonable man would have believed to be true. A reasonable man, knowing of Smith's sensitive and unstable condition, would have foreseen the possibility of suicide. The third component is that the defendant must have acted in an unreasonable fashion, considering the balance of potential benefit v. the risk of harm, in light of circumstances a reasonable man would have believed to be true. In light of Smith's sensitive and unstable nature, the potential benefit of arousing him would have been small, and the risk of suicide great. A reasonable man would not have so acted; thus, on the last two bases the defendant was criminally negligent.

Smith would be held criminally responsible under the statute for manslaughter for all requirements are satisfied: his voluntary conduct was the proximate cause of death and he had been criminally negligent with respect to the death.

Willis owned a factory which contained forty machines with large, powerful cutting blades. About once a month an operator of a machine would be injured, the injuries varying from a slight nick to a severed hand. The machines could have been made safe by extensive alteration at the cost of $50,000 per machine. The factory could not afford such an expense without risk of ruin. The factory did install inexpensive plastic shields which reduced accidents by fifty per cent. One operator, a hemophiliac, was cut and bled to death. Discuss Willis' criminal responsibility for manslaughter:

> Manslaughter: the killing of a human being by the act, procurement or culpable negligence of another, in cases where such killing shall not be justifiable or excusable homicide. . . .

General principles of criminal responsibility require that the defendant's voluntary conduct be a proximate cause of a criminal result, accompanied by a mental element--the defendant must have intended the criminal result or have been reckless or criminally negligent relative to the criminal result.

The first requirement concerns voluntary conduct. The defendant had failed to have the machines altered. The omission was no doubt voluntary. However, to be the basis of criminal responsibility, the omission must have been of a legal duty, not merely a social obligation. In this text the legal duty is assumed--and in cases such as this, usually the employer has a legal duty to supply reasonably safe working conditions and machinery.

The second requirement concerns causation. The defendant's voluntary conduct must have been a proximate cause of the criminal result. The defendant's voluntary conduct was a proximate cause if it played an appreciable and substantial part in the criminal result.

Where the conduct contributed to the death, but alone would not have caused death, it played an appreciable and substantial part if other causes, acting without the defendant's conduct, would not have caused death. Hemophilia alone would not have caused death. Where the result is caused by an intervening force, the defendant's conduct may still have played an appreciable and substantial part if it had set in motion the intervening force, and the occurrence of the criminal result was a risk associated with the intervening force. The intervening force (unsafe machine) was set in motion by the conduct of the defendant. Where a machine is capable of severing a hand, death is an attendant risk. The voluntary conduct of the defendant was a proximate cause of the death.

The third requirement concerns the criminal result and is obviously satisfied by a criminal homicide. The final problem concerns the mental element, under the statute defining manslaughter. This statute specifically provides that criminal (or culpable) negligence will suffice.

The first component of criminal negligence, legal duty, is assumed. The second component is that a reasonable man would have foreseen that his voluntary act possibly or probably would cause the criminal result, in light of circumstances a reasonable man would have believed to be true. A reasonable man, in light of the past injuries to operators, would have foreseen death as a possible or probable result.

The third component is that the defendant must have acted in an unreasonable fashion, considering the balance of potential benefit v. the risk of harm, in light of circumstances a reasonable man would have believed to be true. The risk of harm was loss of fingers, hands, or even life of operators. The potential benefit of not spending the money to alter the machines was keeping the factory running. Expenses of alteration might have been ruinous. This is a difficult question, and opinions would no doubt vary. Perhaps most juries would consider that keeping the factory in operation justified the risk of death. If so, the conduct of the defendant would not have been unreasonable.

Even though the defendant's voluntary conduct was a proximate cause of the death, the defendant would not be criminally responsible because he was not criminally negligent; his conduct had not been unreasonable.

Admitting that the defendant's conduct might be considered by some to be unreasonable, still he might not be criminally negligent. Criminal negligence is distinguished from ordinary negligence as a matter of degree. Criminal negligence is characterized by circumstances where the defendant is under a great duty to meet a degree of "reasonableness" and his conduct falls far short (CN 14), and where the specific criminal result (in this case, death) was foreseen rather than mere general risk of harm. The defendant's duty to employees was high and death specifically was foreseeable, but he hadn't fallen far short of meeting the degree of "reasonableness," due to having installed the plastic shields. The facts might satisfy the requirements of ordinary negligence but not of criminal negligence.

CN 31

COMPARATIVE SUMMARY OF GENERAL PRINCIPLES

I. An act
  A. Voluntary conduct
    1. A voluntary act, or
    2. A voluntary omission of a legal duty
  B. Causation: defendant's voluntary conduct was a proximate cause of a criminal result (played an appreciable & substantial part)
    1. If it alone would have caused the criminal result, or
    2. If the other causes, acting without defendant's conduct would not have caused the criminal result, or
    3. If it had set in motion the intervening force which caused the criminal result, and if the occurrence was a risk associated with the intervening force.

II. Mental element (Intention or recklessness or criminal negligence)

<table>
<tr><th>A. Intention</th><th>B. Recklessness</th><th>C. Criminal negligence</th></tr>
<tr><td rowspan="5">1.Defendant acted in order to cause the criminal result;
or
2.The defendant himself must actually have foreseen with substantial certainty that his voluntary conduct would cause the criminal result, in light of circumstances</td><td colspan="2">1.Defendant must have been under legal duty to conduct himself in reasonable fashion.</td></tr>
<tr><td>2.The defendant himself must actually have foreseen that his</td><td>2.A reasonable man (not the defendant) would have foreseen that his</td></tr>
<tr><td colspan="2">voluntary act possibly or probably would cause the criminal result, in light of circumstances that</td></tr>
<tr><td>the defendant believed to be true.</td><td>a reasonable man (not the defendant) would have believed to be true.</td></tr>
<tr><td colspan="2">3.The defendant must have acted in an unreasonable fashion, considering the balance of potential benefit v. risk of harm, in light of circumstances that</td></tr>
<tr><td colspan="2">the defendant himself believed to be true.</td><td>a reasonable man (not the defendant) would have believed to be true.</td></tr>
</table>

GENERAL PRINCIPLES

II. Mental element
    A. Intention or
    B. Recklessness or
    C. Criminal negligence
    D. Transferred intent

You have learned that usually criminal responsibility requires that a person have intended the criminal result or have been reckless or negligent with respect to the criminal result. Now you will learn an exception to this general rule. The courts recognize a theory called "transferred intent," whereby a person may be found guilty of a criminal result even though he had not intended the criminal result, and had not been reckless or negligent with respect to it. The theory of transferred intent is needed to establish criminal responsibility only if the person had not

__________________ the criminal result, and had been neither

_____________________ nor ____

with respect to it.

intended

reckless, criminally negligent

Suppose Able saw his enemy Baker in a crowd of people. Able shot at Baker, intending to kill him, but missed and killed Cannon. Able had not intended to kill Cannon, but if he himself had foreseen the possibility of causing Cannon's death, he could be guilty of a degree of homicide satisfied by ____________________. The state would have no need to use "transferred intent" to establish criminal responsibility.

recklessness

In the above case, suppose that Able himself had not foreseen the possibility of causing Cannon's death, but a reasonable man would have. Able could be guilty of a degree of homicide satisfied by ____________________ ____________________, and the state would have no need to use "transferred intent."

criminal negligence

But suppose while hunting deep in an isolated part of a forest, Able saw his enemy Baker. Also suppose a reasonable man would not have foreseen that another person might be near. Just as Able shot at Baker, intending to kill him, Cannon stepped from behind a tree and came into range. The bullet missed Baker and killed Cannon. According to the established general principles, Able could not be held criminally responsible for Cannon's death because Able had not intended Cannon's death, nor had he been reckless or criminally negligent with respect to Cannon's death. So, in order to hold Able criminally responsible, the state must resort to the exception called "transferred intent."

The theory of transferred intent operates to hold Able responsible for Cannon's death by "transferring" Able's intention to kill Baker to an intention to kill Cannon. By this fiction, Able is "said" to have intended to kill Cannon. Able's intention to kill Baker is "________________________" to an intention to kill Cannon.

transferred

The courts indulge in this fiction of transferred intent in order to produce just decisions according to the _culpability_ of the defendant in each case. In the case we have just analyzed, Able was _culpable_ because he had intended to kill Baker. His _culpability_ is not decreased by poor marksmanship. Able should be held criminally responsible for Cannon's death because his conduct was ____________________________.

culpable

Thus you see that the rationale for the theory of transferred intent and the policy which governs its use is culpability. If a person intended one criminal result, or if he himself had foreseen the possibility or probability of causing that criminal result (recklessness), he is quite culpable. If the person himself had not foreseen the possibility, but a reasonable man would have foreseen it (criminal negligence), he is less culpable. Thus, courts will "transfer" intention or recklessness, but will not "transfer" criminal negligence. The theory of "transferred" intent will apply only if the accused ________________ a criminal result or was ________________________ with respect to a criminal result.

intended

reckless

(Note: Although the theory applies to both intention and recklessness, in by far the majority of cases the theory is applied where the accused intended the criminal result. Hence the term "transferred intent.")

Suppose Morgan and his hunting companion Stevens were tracking game. When they stopped for a few moments to rest, Morgan leaned his rifle against a small tree. As the tree swayed a bit in the wind, the gun fell to the ground and fired, killing Rogers, fifty yards away, hidden by the bushes.

Assume that a reasonable man would have foreseen the possibility of death to Stevens but not to Rogers. Morgan, then, could have been criminally negligent in relation to Stevens, but not to Rogers. Morgan was charged with a degree of homicide which could be satisfied by criminal negligence (manslaughter) for the death of Rogers. Could Morgan be held criminally responsible for Rogers' death?_______ Explain:________________________________

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No. Morgan would not be held criminally responsible for Rogers' death for two reasons: he was not criminally negligent relative to Rogers, and his criminal negligence with respect to Stevens could not be transferred to Rogers. The theory of transferred intent may not be used to transfer criminal negligence.

Be sure to remember that the theory of transferred intent applies only where the person originally had intended a criminal result or was reckless with respect to a criminal result and therefore was culpable.

If a person shot at the bull's-eye of a target and missed and killed a bystander, the theory of transferred intent would not apply because ____

____

the person who shot at the bull's-eye had not intended a criminal result, nor was he reckless with respect to a criminal result, and therefore was not culpable.

Suppose that Billings attacked Cunningham, who lawfully shot at Billings in self defense. Cunningham's shot missed Billings, but hit and killed Dennis. Would the theory of transferred intent apply to Dennis' death?_______ Explain:

____

____

____

No. Cunningham's conduct was an act in self defense. He had not intended a criminal result, nor had he been reckless, and therefore the theory of transferred intent does not apply.

In the case where Able missed Baker and killed Cannon, Able's conduct was quite culpable; he had intended a criminal result, and he was held criminally responsible for Cannon's death. In the last case, Cunningham's action had been in self defense; he had intended no criminal result, and he was not considered culpable at all. Cunningham was not criminally responsible for Dennis' death.

All intermediate degrees of culpability may occur. Suppose that a man was only slightly culpable--he threw a banana peel on the sidewalk in breach of a littering ordinance. A woman slipped on it, fell, fractured her skull, and died. To hold the man responsible for a crime as serious as homicide for such slight culpability as littering the streets would be unjust. Therefore, the principle of transferred intent must be limited to cases where the person had intended a criminal result which involves a considerable degree of ____________________.

culpability

Some states express this limitation by holding that the principle of transferred intent will apply only if the intended crime is _malum in se_ (evil in itself--high culpability), and would not apply if the intended crime is merely _malum prohibidum_ (evil only because prohibited--low culpability). Such states would not hold the litter-bug responsible for the death of the victim because littering is not __________ ___ ____.

malum in se

This distinction is not universally accepted by any means because, among other reasons, there is no dependable test to distinguish malum in se crimes from malum prohibidum crimes. However, many legislators feel that the theory of transferred intent should not be used to hold a defendant criminally responsible for an unintended crime which is much more serious or culpable than the crime the defendant had intended. This view is evident in the following statutory definitions of first and third degree murder and manslaughter.

First degree - The unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed or any human being, or when committed in the perpetration of or in the attempt to perpetrate any arson, rape, robbery, burglary, abominable and detestable crime against nature or kidnaping, shall be murder in the first degree, and shall be punishable by death.

Third death - When perpetrated without any design to effect death, by a person engaged in the commission of any felony, other than arson, rape, robbery, burglary, abominable and detestable crime against nature, or kidnaping, it shall be murder in the third degree and shall be punished by imprisoned in the state prison not exceeding 20 years.

Involuntary manslaughter - When perpetrated without any design to effect death by a person engaged in the commission of an unlawful act not amounting to a felony, shall be involuntary manslaughter.

You see, the legislators decided that arson, rape, etc., are sufficiently culpable to be the bases for first degree murder (high penalty) while all other felonies are not so culpable and so would be bases for third degree murder (lower penalty); and unlawful acts less than felonies (misdemeanors) are least culpable, and so would be bases for involuntary manslaughter (least penalty).

These statutes are examples of the felony-murder rule. The person may be held criminally responsible for murder even though he hadn't intended to kill, because he had intended to commit a felony.

The felony-murder rule has been limited to situations in which death was caused by an act done in furtherance of a felony.

Suppose Smith and Jones slipped into a man's home in order to kidnap him. The man perceived his danger and died of a heart attack. Smith was charged with murder in the first degree. Is he criminally responsible?______ Explain:________________________

____

Yes. Smith intended to kidnap the victim and death occurred in the furtherance of the kidnaping.

Since Jones also intended the kidnaping, and death occurred in the furtherance of the kidnaping, Jones is also criminally responsible for murder in the first degree. It is not necessary that Jones have done the act which caused the death.

Now suppose that the homeowner had sneaked downstairs and shot and killed Smith. Jones was charged with the murder of Smith. Although Jones had intended to kidnap the owner, and although it is not necessary that Jones have done the act which caused death, Jones is not criminally responsible for Smith's death because

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____

the act which caused Smith's death had not been done in furtherance of the felony but in resisting the felony.

Suppose that Smith and Jones were frightened by a policeman in a patrol car and tried to flee. The police gave chase. Smith and Jones sped away as fast as possible and hit and killed a pedestrian. They were charged with murder in the first degree on the theory of the felony-murder rule. The issue would be

____

____

whether or not the escape is considered to be in furtherance of the felony.

The general principle of transferred intent does not apply where the intention to cause a particular criminal result is required by the definition of the crime. For example, larceny is

> the taking and carrying away of the personal property of another with intent to permanently deprive.

"Intent to permanently deprive" must be the defendant's actual intention; consequently, such intention cannot be based on the theory of transferred intent.

Intending to kidnap Noonan, Morris knocked him unconscious and picked him up in order to carry him away to a hide out. Unknown to Morris, Noonan had a $1,000 bill taped to his chest. Morris could not be guilty of larceny of the $1,000 bill because

____

____

____

____

Morris had not actually intended to permanently deprive Noonan of the bill. Morris could not be guilty of larceny on the basis of transferring the intention to kidnap to the intention to permanently deprive Noonan of the bill, because intent to permanently deprive is an element specifically required by the definition of larceny.

The theory of transferred intent applies both to unintended victims and unintended results. In the case where Able had intended to kill Baker, but missed and killed Cannon (TR 4), the theory applied to an unintended victim, Cannon.

Suppose Jones intended to rape Mary. He followed her into a secluded part of a park and threw her to the ground. She died from a heart attack, and Jones was charged with murder. He could be held criminally responsible for her death by "transferring" the intention to rape to the intention to kill. The theory is applied to an unintended __________________.

result

The general theory of transferred intent applies to both unintended victims (Cannon instead of Baker, as in the first case) and unintended criminal results (murder instead of rape, as in the latest case).

Brown shot at Johnson intending to wound him (a battery). The bullet missed and killed Russell. If Brown were held criminally responsible for Russell's death, the theory of transferred intent would have been applied to an unintended ____________ and also to an unintended _________________.

victim

result

Don't forget that the act of the person must have been a proximate cause of the criminal result.

A hunter shot at Miller intending to kill him, but missed and hit Perkins in the leg. The wound ordinarily would have been expected to heal without any difficulty. However, the doctor who treated the leg thought that Perkins' appendix was about to burst and operated under emergency conditions. The abdominal wound became infected and Perkins died. The hunter was prosecuted for the death of Perkins. Intent to kill Miller may be transferred to intent to kill Perkins. The issue is whether or not ______________

____

the act of the defendant was a proximate cause of Perkins' death.

SUMMARY OF GENERAL PRINCIPLES

II. Mental element
- A. Intention or
- B. Recklessness or
- C. Criminal negligence
- D. Transferred intent

1. Where a person intended to cause one criminal result or was reckless with respect to one criminal result, he may be held criminally responsible for a different criminal result, even though it was unintended, by the theory of transferred intent.

2. Limitations upon the theory of transferred intent

   a. The theory of transferred intent may be used to transfer intention and recklessness, but may not be used to transfer criminal negligence.

   b. According to some courts, the theory will not be used unless the intended criminal result was *malum in se*.

   c. Statutory definitions apply the theory so that the defendant is not held criminally responsible for an unintended criminal result which is much more culpable than the intended criminal result (ex., homicide statute).

   d. The felony-murder rule is a particular instance of the theory of transferred intent and is limited by the requirement that the death must have occurred in the furtherance of a felony.

   e. The theory of transferred intent does not apply to satisfy a specific intention required by a definition of a specific crime (ex., definition of larceny).

3. The defendant's act must have caused the unintended result.

David and Allen were camping out for the night. Charlie was hiding in the bushes waiting for them to go to sleep so that he could steal their supplies. Allen made a nasty remark to David and David fired his gun at Allen, intending to hit him in the leg. (The intended result of this act would be aggravated assault and battery, a felony.) The bullet missed Allen but killed Charlie. David was charged with the murder of Charlie. Discuss fully.

The general principles of criminal law require that the voluntary conduct of the defendant must have been the proximate cause of the criminal result, accompanied by a mental element. David's act had been voluntary; he had fired the gun consciously and deliberately. David's act was the proximate cause of Charlie's death. One test for causation is that the defendant's act alone would have caused the criminal result. Since nothing other than the bullet was involved, David's act obviously had caused Charlie's death, a criminal result. Finally, David must have intended Charlie's death or have been reckless or criminally negligent with respect to Charlie's death. Since David hadn't known that Charlie was present, (a) he hadn't shot in order to kill Charlie, nor had he foreseen Charlie's death as substantially certain; thus David had not intended Charlie's death. (b) David himself had not foreseen Charlie's death as possible or probable;

thus, he had not been reckless with respect to Charlie's death.

(c) A reasonable man, also, would not have known that Charlie was present, and not have foreseen his death as possible or probable; thus, David had not been criminally negligent with respect to Charlie's death.

Since David had not intended Charlie's death and had not been reckless or criminally negligent with respect to it, he could not be guilty unless the theory of "transferred intent" is applicable. Where a person intended to cause one criminal result (and is therefore culpable) he may be held criminally responsible for a different criminal result, even though it was unintended, by application of the theory of transferred intent. David's intention to shoot Allen in the leg (stipulated) may be "transferred" to the intention to kill Charlie.

However, the application of the theory of transferred intent has several limitations. The limitations in point concern the balance of culpabilities. The unintended result should not be much more culpable than the intended result. In this case, the unintended homicide is more culpable than the intended battery. The problem, then, is one of degree. Some courts hold that the theory of transferred intent should not apply unless the intended crime was _malum in se_ (evil in itself) and quite culpable. Most persons would agree that aggravated assault and battery is quite culpable and could be classified as _malum in se_. Thus, the limitation would not preclude the application of the theory of transferred intent.

In some instances the problem has been resolved by legislation, enacting statutes which provide for specified "transfers." Some homicide statutes provide for transfer of intention to commit five specified atrocious felonies so as to hold the defendant guilty of murder in the first degree and the transfer of intent to commit any other felony so as to hold the defendant guilty of murder in the third degree. Aggravated assault and battery is a felony, but not one of the five atrocious ones specified. Therefore, under such statutes, the mental element necessary for murder in the third degree would be satisfied. Since all requirements are met, David would be guilty of murder in the third degree.

GENERAL PRINCIPLES

I. An act
II. Mental element
  A. Intention or
  B. Recklessness or
  C. Criminal negligence
  D. Transferred intent
  E. Miscellaneous

Relationship between intervening forces and intention, recklessness, and criminal negligence

You recall the following test for proximate cause:

Where the result was caused by an intervening force, the defendant's act played an appreciable and substantial part and thus was a proximate cause (a) if it had set the intervening force in motion, and (b) if the occurrence of the result was a risk associated with the intervening force.

The second part of the rule provides that the defendant's conduct would not have been the proximate cause unless the "occurrence of the criminal result was a risk associated with the intervening force." This, of course, means that the criminal result must have been foreseen or reasonably foreseeable. Therefore, this rule of causation is based upon ____________________.

foreseeability

But "causation" and "foreseeability" are *not* related. Whether or not a wound *in fact caused* the victim's death is entirely independent of whether a doctor, a reasonable man, or anyone else would have "foreseen" the death. So you see, testing "causation" by "foreseeability" is inappropriate. Therefore, the rule of causation you learned should not incorporate the limitation imposed by the second part of the rule, "the occurrence of the result must be a risk associated with the intervening force." The rule could read as follows:

> Where the result was caused by an intervening force, the defendant's act played an appreciable and substantial part and is a proximate cause if it set the intervening force in motion.

But no doubt your sense of justice requires that the defendant should not be criminally responsible unless the result was foreseeable. *Criminal responsibility should* be limited by foreseeability. Where, among the general principles, could foreseeability appropriately be used as a means of limiting criminal responsibility?

in the mental element, intention, recklessness, and criminal negligence.

The appropriate place would be the mental element--intention (the defendant intended and thus had foreseen the result, or the defendant had foreseen the result as substantially certain), recklessness (the defendant had foreseen the result as possible or probable), and criminal negligence (a reasonable man would have foreseen the result as possible or probable). A just decision can be reached by the application of foreseeability within this context.

One of the cases you analyzed under causation (GP 23) will be reanalyzed using the revised statement of the causation rule, and limiting criminal responsibility by foreseeability within the context of intention, recklessness, and criminal negligence (rather than within the context of causation).

Watson handed a knife to a fellow camper without paying attention to what he was doing, and cut the victim's thumb. Although the wound was superficial, the victim procured a tetanus shot from a physician who, it turned out, had scarlet fever. The victim contracted scarlet fever and died from it.

The first example will be one wherein "foreseeability" will be analyzed in relation to intention, not in relation to causation.

The first general principle is that the act of the defendant must have been voluntary. The facts indicate that Watson deliberately and consciously handed the knife to the victim. The act had been voluntary.

The second general principle is that the defendant's act must have been a proximate cause of the criminal result (death). The test is whether or not the act of the defendant had played an appreciable and substantial part in the result. Where the result was caused by an intervening force, the defendant's act played an appreciable and substantial part if it had set the intervening force into motion (revised rule). Watson's act had set the need for a tetanus shot--and thus contact with a doctor who had scarlet fever--into motion. Watson's act had played an appreciable and substantial part and thus was _a_ proximate cause of death.

The third general principle is the mental element. There are two tests for intention, either one of which will satisfy the requirement:

1. The defendant must have done the voluntary act in order to cause the criminal result. Watson had done the act in order to give the victim the knife, not to kill him. This test is not satisfied.

2. The defendant himself must actually have foreseen with substantial certainty that his voluntary conduct would cause the criminal result, in light of circumstances the defendant himself had believed to be true. Watson only had planned to hand the knife to the victim. Watson hadn't foreseen the cut nor death from scarlet fever as substantially certain. This test is not satisfied.

Thus, neither test for intention is satisfied. Watson is not criminally responsible even though his act had been voluntary and a proximate cause of death, because he had not intended death.

The next example will be one wherein "foreseeability" will be analyzed in relation to recklessness, not in relation to causation.

The discussion of the first and second general principles is the same as discussed under intention. Watson's conduct was voluntary and a proximate cause of death. The third principle is the mental element, recklessness. The requirements of recklessness are:

1. The defendant must have been under a duty to conduct himself in a reasonable fashion. Assumed.

2. The defendant himself must actually have foreseen that his voluntary conduct possibly or probably would cause the criminal result, in light of circumstances the defendant had believed to be true. Watson hadn't foreseen that he might

possibly or probably nick the victim with the knife, nor had he foreseen that the victim would contract scarlet fever and die. Thus, this requirement was not met and Watson is not reckless.

3. The defendant must have acted in an unreasonable fashion, considering the balance of potential benefit v. the risk of harm, in light of circumstances the defendant had believed to be true. Not in point to discuss.

Thus, Watson is not criminally responsible for a homicide based upon recklessness, even though his act had been voluntary and a proximate cause of the death, because he was not reckless.

The next example will be one wherein "foreseeability" will be analyzed in relation to criminal negligence, not in relation to causation.

The discussion of the first and second principles is the same as just discussed under recklessness. The defendant's conduct had been voluntary and a proximate cause of the death. The third general principle is the mental element, criminal negligence. The requirements of criminal negligence are:

1. The defendant must have been under a legal duty to conduct himself in a reasonable fashion. Assumed.
2. A reasonable man (not the defendant) would have foreseen that his voluntary act possibly or probably would cause the criminal result, in light of circumstances a reasonable man (not the defendant) would have believed to be true. A reasonable man might have foreseen that failing to pay attention while handling a knife might cause a cut, but he would not have foreseen that the victim would contract scarlet fever and die. Therefore Watson had not been criminally negligent.

3. The defendant must have acted in an unreasonable fashion, considering the balance of potential benefit v. the risk of harm, in light of circumstances a reasonable man (not the defendant) would have believed to be true. Not in point to discuss.

Thus, even though Watson's conduct had been voluntary and a proximate cause of the death, he would not be criminally responsible for a homicide based upon criminal negligence.

In all cases your sense of justice would be satisfied. This was accomplished by an appropriate use for foreseeability as related to the intention, recklessness, or criminal negligence, rather than an inappropriate use of foreseeability related to causation.

You probably wonder why the rule on intervening causes was presented in this text in the first version rather than in the revised version developed in this section. The reason is usage. The version first presented is in common use in courts and is referred to by some text writers. Therefore, you should be familiar with it and be able to use it. Several text writers have pointed out the inconsistency discussed here. You should be able to analyze cases in both ways. Because of usage, cases in this text have been analyzed using the rule as originally presented, and subsequent cases will be analyzed using the rule as originally presented, but you should be aware of the inconsistency.

Mens Rea, Specific Intent, and General Intent

The term *mens rea* appears frequently in cases and text books. You should become familiar with it. Unfortunately the term has been used in different ways and so has different meanings. The broadest meaning of *mens rea* refers to the "mental element" or "state of mind" necessary for most crimes (intention, recklessness, or criminal negligence). A more limited and more precise meaning of *mens rea* refers to the common element of intention and recklessness--foresight by the defendant *himself* of the risk that his act might cause the criminal result. This definition of *mens rea* precludes criminal negligence, for the defintion of criminal negligence may be satisfied if a *reasonable man* (not the defendant) would have had such foresight.

The terms "specific intent" and "general intent" also appear frequently in the cases and text books. Again, the terminology is not always uniform. The term "specific intent" corresponds to the concept of intention developed in this text. It is used most frequently in reference to crimes in which the definition specifically requires intention (ex: burglary--breaking and entering the dwelling of another in the nighttime with *intent* to commit a felony therein.)

The term "general intent" as it is sometimes used corresponds to the concept of recklessness developed in this text. At other times the term "general intent" refers to either recklessness or criminal negligence as developed in this text.

Since you have learned to analyze cases in terms of intention, recklessness, and criminal negligence, the terms mens rea, specific intent, and general intent will not be important to you as analytical tools for the remainder of this text. They are terms you should recognize and understand when you meet them in other texts and cases.

Crimes which do not require intention, recklessness, or criminal negligence

By far the majority of crimes requires a voluntary act which was the proximate cause of the criminal result plus the mental element (intention, recklessness, or criminal negligence). The definition of a very few crimes may be satisfied without such mental element. It would seem harsh to punish a person who hadn't intended the criminal result nor had been reckless nor criminally negligent; so, as you would expect, such crimes are limited to very few situations--generally those involving matters of great public concern.

The sale of liquor to minors is considered a matter of great public interest. Suppose a statute prohibited the sale of liquor to minors, and suppose the courts interpret the statute as requiring intention or recklessness or criminal negligence. A boy of twenty stated that he was twenty-two and the bartender served him. The state might not be able to prove that the bartender had intended to serve a minor or that he had been reckless or criminally negligent in this regard. The difficulty of obtaining convictions might induce bartenders to become lax.

If the courts interpret the statute as not requiring a mental element, the bartender would be responsible for serving the minor even though the bartender might reasonably have believed the minor was an adult. Under these strict circumstances bartenders might be more vigilant. Thus, the harsh result in specific instances to individual bartenders is justified as promoting a matter of great public interest. But remember, the great majority of crimes requires the mental element--intention or recklessness or criminal negligence.

GENERAL PRINCIPLES

III. Defenses

A. Mistake of fact

Suppose Patterson married a woman who, unknown to him, was his niece. He was mistaken in two ways. First, he didn't know that the woman he married was in fact his niece. Second, he didn't know that such marriages constitute a criminal result (prohibited by statute).

Mistakes are classified as either mistake of fact or ignorance of law. Patterson's mistake as to the lineal relationship to his bride would be classed as a _______________ _____ _______________.

mistake of fact

His mistake as to the legality of the marriage would be classed as ________________________ ______ _________.

ignorance of law

Not all mistakes constitute a defense. Three requirements must be met in order that the mistake constitutes a defense. First, note that some types of mistake of fact are defenses, but ignorance of law generally is not a defense. Rare exceptions will be discussed later. Therefore, the first requirement that must be satisfied for a mistake to be a defense is that the mistake must be a mistake of fact, not ignorance of law.

Might the error of the man's not knowing that the woman was his niece be a defense?________ Explain:____________________________

____

Yes. The first requirement is that the mistake must be a mistake of fact. This error concerned the fact of their relationship--a mistake of fact--and therefore might be a defense.

Would the error of now knowing that such marriages constitute a criminal result be a defense?______ Explain:

____

____

No. Ignorance of the law--that the act had constituted a criminal result--generally is not a defense.

The second requirement is that the mistake of fact must have been operative. A mistake of fact will not be a defense unless courts take the mistake into account--that is, unless the courts give the defendant "credit" for his mistake. To understand when the mistake will be operative--when the courts will take the mistake into account, give the defendant "credit" for the mistake--you must understand how mistake of fact functions as a defense.

You recall the defendant in a crowded railway station who carried away a suitcase which looked like his own but belonged to another. He was charged with larceny (the taking and carrying away of the personal property of another with intent to permanently deprive). He was not guilty because his mistake of fact as to the identity of the suitcase negated any _________________ to permanently deprive.

intent

Mistake of fact may function as a defense by negating intention, recklessness, and criminal negligence. These concepts should be familiar to you because the effect of mistake of fact was incorporated in the discussion of intention, recklessness, and criminal negligence. You recall that both intention and recklessness are determined in light of facts which the *defendant* believed to be true. This being so, the defendant is entitled to introduce evidence of what *he* believed the *facts* to be, because this would bear upon whether or not *he* actually would have intended or would have foreseen the consequences.

A hunter mistakenly believed that he was alone. He shot through the bush and hit and killed a hidden hunter. Could he be guilty of a homicide which requires intention?________ Explain:

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No. There are two tests for intention either of which will satisfy the requirement:

1. The defendant must have done the act in order to cause death.
2. The defendant himself must have foreseen with substantial certainty that his act would cause death.

In light of circumstances the defendant had believed to be true (he was alone), neither test would be satisfied.

Could the hunter be guilty of a homicide which would be satisfied by recklessness?_______ Explain:_______________________

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____

No. In order to have been reckless the defendant must have foreseen that his act would possibly or probably cause death. In light of circumstances he had believed to be true (he was alone), he would not have foreseen death.

Mistake of fact may be a defense to crimes which require intention or recklessness whether the mistake is a reasonable one or not, because the test is based upon circumstances as the defendant (not a reasonable man), had believed them to be. Criminal negligence, on the other hand, is determined in light of circumstances as a reasonable man would have believed them to be. Thus, mistake of fact would not be a defense to crimes that are satisfied by criminal negligence unless the defendant had been mistaken and a reasonable man also would have been mistaken--a "reasonable mistake."

Anderson took his son on a fishing trip. They forgot a particular mess of fish and left them on the bank. Next day Anderson found the fish, cooked them, and fed them to his boy. The fish had spoiled and the boy died. Anderson was charged with manslaughter based upon criminal negligence. He proved that he hadn't known that the fish were spoiled. What is the predominant issue?______________

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The predominant issue is whether the mistake of the defendant as to the condition of the fish was "reasonable"--whether a reasonable man, as well as the defendant, would have been mistaken--and thus not have foreseen death as possible or probable.

Now you are ready to formulate the rules which determine when the mistake of fact will be operative (the second requirement of the defense of mistake of fact):

a. If the crime is based upon intention or recklessness, any mistake of fact the defendant actually made is operative, for in such crimes the facts are taken as the defendant actually believed them to be.

b. If the crime is based upon criminal negligence, only a reasonable mistake of fact is operative (a mistake a reasonable man would have made).

Suppose Albert mistakenly thought that his pistol was not loaded. He pointed it at his friend and pulled the trigger. The gun fired a bullet which killed the friend. Albert was charged with a homicide based upon intention or recklessness. Suppose a reasonable man would not have made the mistake. Would the mistake be operative?_____ Explain:____

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Yes. Where the crime is based upon intention or recklessness, any mistake the defendant made is operative--it need not be a reasonable mistake--for in such crimes the facts are taken as the defendant believed them to be.

Suppose the defendant in the last case was charged with a degree of homicide based upon criminal negligence. Would the mistake be operative?________ Explain:____________________________

____

No. If the crime is based upon criminal negligence only a reasonable mistake will be operative, and the facts stipulated that the defendant's conduct was unreasonable.

In this case, then, could the mistake of fact be a defense to a homicide based on criminal negligence?_______ Explain:

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____

No. The mistake of fact is not operative because a reasonable man would have checked the gun.

The third requirement concerns the legal effect of a mistake of fact. Even an operative mistake of fact would not be a defense if the event would still have constituted a crime in spite of the mistake. For example, if a person would still be held to have intended the criminal result, in spite of the mistake of fact, the mistake would not negate the intention and thus not be a defense.

Suppose an assassin intended to shoot and kill the sheriff while the sheriff was making a political speech. An official stood up on the speaker's platform to introduce the sheriff. The assassin mistook the official for the sheriff, and so shot and killed him. The assassin was charged with a degree of homicide which requires intention. In spite of this operative mistake of fact, the event would still constitute a crime because the mistake would not have negated the ____________________ to kill.

intention

Requirement number three: If, in light of the operative mistake of fact, the event would not have constituted a crime, the mistake is a defense. Therefore, for the defendant's error to be a defense, three requirements must be satisfied:

1. The error must have been a mistake of fact, not ignorance of law.
2. The mistake of fact must have been operative.
    a. If the crime is based upon intention or recklessness, any mistake of fact the defendant actually made is operative.
    b. If the crime is based upon criminal negligence, only a "reasonable mistake" is operative.
3. In light of the operative mistake of fact, the event must not have constituted a crime (but if, in spite of the mistake, the event would still have constituted a crime, the mistake is not a defense).

Gray thought that the white powder he put into his wife's coffee was sugar. Actually, it was cyanide (a deadly poison). Gray was charged with a homicide based upon intention. Would the error be a defense?______ Explain:________________________________

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Yes. For the error to be a defense, three requirements must be satisfied:

1. The error must have been a mistake of fact, not ignorance of law. The mistake concerned identity of a powder, a fact.

2. The mistake of fact must have been operative. Where the crime is based upon intention or recklessness, any mistake the defendant actually made is operative. In this case, the crime requires intention--therefore, the mistake is operative.

3. In light of the operative mistake of fact, the event must not have constituted a crime. The crime requires intention. In light of the operative mistake of fact (powder was sugar), putting the powder into the coffee was not evidence of either test for intention (doing the act in order to kill or foreseeing death as substantially certain). The required intention was thus negated and the event would not have constituted a crime. The mistake is a defense.

Now assume that Gray thought that the white powder was arsenic, also a poison, when in fact it was cyanide. He put the powder into his wife's coffee and she died. He was charged with a homicide based upon intention. Would the error be a defense?______ Explain:

No. For the error to be a defense, three requirements must be satisfied:

1. The error must have been a mistake of fact, not ignorance of the law. Satisfied as previously discussed.

2. The mistake of fact must have been operative. Satisfied as previously discussed.

3. In light of the operative mistake of fact, the event must not have constituted a crime (but if, in spite of the mistake, the event would still have constituted a crime, the mistake is not a defense). The crime requires intention. In light of the operative mistake of fact (powder was arsenic), the husband's putting the powder into the wife's coffee would have been evidence of doing the act in order to kill. The requirement of intention would be satisfied. The event could still constitute a crime and the mistake of fact would not be a defense.

Early one morning while Baker and his boy were spearfishing, the boy was bitten on the hand by a moray eel. The boy asked to be taken ashore immediately for treatment because the bite from a moray is extremely infectious. Baker insisted on fishing until sunset because he thought the boy had been bitten by a barracuda, which he thought was less infectious. Baker had caught only a fleeting glimpse of the creature. The boy had had a longer and clearer view. Therefore, assume that Baker's belief that the creature was a barracuda was unreasonable. The boy died soon of an infection. Baker was charged with manslaughter based on criminal negligence. Would the error be a defense?______ Explain:

(Next page)

DE 16

No. For error to be a defense, three requirements must be satisfied:

1. The error must have been a mistake of fact, not ignorance of law. This mistake concerned the identity of a sea creature, a fact.

2. The mistake of fact must have been operative. Where the crime is based upon criminal negligence, only a "reasonable mistake" would be operative. The facts stated that a reasonable man would have taken the boy's word. The mistake was not a reasonable one and so is not operative.

3. Since the mistake is not operative, discussion of the third requirement is immaterial.

Suppose in this case that Baker had had a better view of the creature than the boy had had, and a reasonable man would have agreed that the creature was a barracuda. Would the error be a defense?_____ Explain:____

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No. For the error to be a defense three requirements must be satisfied:

1. The error must have been a mistake of fact, not ignorance of law. Satisfied as previously discussed.

2. The mistake of fact must have been operative. Where the crime is based upon criminal negligence, only a "reasonable mistake" would be operative. Since the facts stated that a reasonable man would have believed that the creature was a barracuda, the mistake was reasonable and therefore operative.

3. In light of the mistake of fact, the event must not have constituted a crime. The crime requires criminal negligence. In light of the mistake of fact (a barracuda bit the boy), the defendant still could have been considered criminally negligent because a reasonable man would have foreseen the possibility or probability of death from a barracuda bite, and his conduct was unreasonable, for the benefit of fishing the rest of the day would not balance the risk of death.

You recall that a few crimes involving matters of great public concern require only voluntary conduct which is the proximate cause of the criminal result--no mental element--no intention, recklessness, or criminal negligence is necessary. Courts have considered these matters to be so important that mistake of fact has not been accepted as a defense to these few crimes (sale of intoxicants to minors, for example). This is understandable because mistake of fact operates as a defense by negating intention, recklessness, and criminal negligence. Thus, if a bartender mistakenly believed a minor were twenty-two and sold him whiskey, his honest mistake of fact would not be a defense.

Suppose a statute prohibited intercourse with a female under eighteen years of age. The defendant had intercourse with a seventeen-year-old girl he honestly believed to be twenty. The mistake of fact would not be a defense if the statute ____________

____

required only voluntary conduct and not intention, recklessness, or criminal negligence.

You recall that ignorance of the law generally is not a defense. Frequently courts have held that where a defendant seeks and follows professional legal advice concerning a criminal law but the advice is in error, the ignorance of the law is no defense. However, occasionally courts have allowed such a defense.

Suppose Carlton wanted to sell certain securities. He knew a criminal statute regulated the sale of some securities, but wasn't sure whether or not the statute would prohibit the sale of a particular security he owned. He sought the opinion of the administrators of the act, who advised him that he would sell and he did so. He subsequently was charged with a violation. The court considered the sale to be in violation of the statute, but found him not guilty because the purpose of the statute was not to punish conduct such as his. Such decisions are most unusual.

DE 21

Suppose a driver's speedometer was in error and indicated 14 mph when actually the car was going 20 mph. The driver was picked up driver was picked up driving 20 mph in a 15 mph zone. He subsequently discovered the error in his speedometer and argued two defenses: first, he hadn't known that the speed limit in that zone was 15 mph.; and second, due to error of the speedometer, he hadn't known that he was exceeding the speed limit. Is he criminally responsible for violating the speed law?_______ Explain your decision and answer both defenses:

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No. Considering his first defense:

To be a defense, the error must have been a mistake of fact, not ignorance of the law. Here the defense concerned a misconception of rules of law and is not a defense.

Considering his second defense, three requirements must be met in order that the mistake constitute a defense:

1. The error must have been a mistake of fact, not ignorance of the law. His misconception concerned the facts--his speed--a mistake of fact.

2. The mistake of fact must have been operative. Assuming that breach of the statute would be based upon intention or recklessness, any mistake the defendant actually made would be operative.

3. In light of the mistake, the event must not have constituted a crime. In light of the mistake (that he was going 14 mph) the defendant would have been within the speed limit and the act would not have been a crime. The defendant would not be held to have intended to speed nor would he be held reckless. Therefore, mistake of fact is a defense.

DE 23

SUMMARY OF GENERAL PRINCIPLES

III. Defenses
A. Mistake of fact

To be a defense the error must satisfy three requirements:

1. The error must have been a mistake of fact, not ignorance of the law.

2. The mistake of fact must have been operative.
   a. If the crime is based upon intention or recklessness, any mistake of fact the defendant actually made is operative.
   b. If the crime is based upon criminal negligence, only a "reasonable mistake" is operative.

3. In light of the operative mistake of fact, the event must not have constituted a crime (but if, in spite of the mistake, the event would still have constituted a crime, the mistake is not a defense))

(Note: 1. Mistake of fact is not a defense to crimes which require only voluntary conduct.

2. Generally, ignorance of criminal law is no defense. Exceptions have been made in cases where the defendant had sought and followed professional legal advice as to criminal regulation, and the advice had been in error.)

A new member of a community was invited to join a neighborhood poker game. He accepted. The game was raided by the police and all participants were charged with an intentional violation of gambling laws. The defendant claimed that he hadn't known neighborhood poker games were illegal and that he hadn't known the chips represented money. He had thought that the game was just for entertainment. The state argued that no reasonable person could not believe that the chips represented money. Consider all elements of criminal responsibility and all errors as possible defenses, and decide the case.

The general principles of criminal responsibility require that the defendant's voluntary conduct must have been the proximate cause of a criminal result, accompanied by a mental element. The first problem concerns volition. Obviously, the defendant's manipulation of the cards was voluntary. The next two problems concern causation and criminal result, and the requirements are obviously satisfied.

The next problem concerns the mental element. The facts stipulate that intention is required. There are two tests for intention, either one of which will satisfy the requirement:

1. The defendant must have done the voluntary act in order to cause the criminal result; or
2. The defendant himself must actually have foreseen with substantial certainty that his voluntary conduct would cause the criminal result, in light of circumstances he had believed to be true.

In order to determine if either of these tests is satisfied, the defendant's two claims must be analyzed:

First, the defendant claimed that he hadn't known that neighborhood poker games were illegal. For the defendant's error to be a defense, the error must have been a mistake of fact, not ignorance of the law. The error alleged concerns a misconception of the rules of law prohibiting gambling. The error is ignorance of law, and thus is not a defense.

Secondly, the defendant claimed that he hadn't known the chips represented money. For the defendant's error to be a defense three requirements must be satisfied:

a. The error must have been a mistake of fact, not ignorance of law. The misconception dealt with the facts (chips representing money) and so was a mistake of fact.

b. The mistake of fact must have been operative. The facts indicate that the crime was based upon intention. In such cases any mistake the defendant actually made is operative.

c. In light of the mistake, the event must not have constituted a crime. The defendant mistakenly had believed that the chips did not represent money or something of value. The event, then, would not have been gambling.

Thus, neither test for intention would be satisfied because the act would not have been done in order to gamble, nor would the defendant have foreseen with substantial certainty that the acts would have resulted in gambling. Therefore, the event would not constitute a crime and the mistake could be a defense.

The state's argument that no reasonable man would have made such a mistake is immaterial, because for crimes based upon intention, the mistake need not be reasonable to be operative. This argument applies only to crimes based upon criminal negligence.

Note: Mistake of fact enters into the full discussion of the case at the point where the general principle of intention or recklessness or criminal negligence is analyzed. This is appropriate because mistake of fact operates as a defense by negating one of these elements.

DE 27

John planned a fake hold-up of a friend, Joe, as a gag. He took all the bullets out of his gun and replaced them with blanks. Unknown to him, his young son removed the blanks and reloaded the gun with bullets. John's wife heard of the gag and said, "That's a childish thing to do. It really isn't funny, and besides, it's dangerous--you know that Joe has a weak heart." John wasn't deterred. One night he disguised himself and followed Joe into a lonely part of a park, stepped in front of Joe, flashed the gun and said, "This is a stick-up! Give me your money." Joe hesitated a moment and John fired into the ground. Joe died of a heart attack. John was charged with manslaughter based upon criminal negligence. Discuss fully.

The general principles of criminal responsibility require that the defendant's voluntary conduct must have been the proximate cause of a criminal result, accompanied by a mental element. The requirements of voluntary conduct and criminal result are obviously satisfied by the facts and need no discussion.

The next requirement is that the defendant's conduct must have been the proximate cause of the criminal result (death). The test is whether or not the defendant's conduct played an appreciable and substantial part in the death. Where the defendant's conduct contributed to the result, but acting alone it would not have caused the result, it nevertheless played an appreciable and substantial part if other causes, acting without the defendant's conduct, would not have caused the result. The defendant's fake stick-up alone wouldn't have caused death--the heart condition was involved. But the heart condition alone wouldn't have caused death at this time--the defendant's conduct was necessary. Therefore, the defendant's conduct was a proximate cause of the death.

The next requirement is the mental element, in this case, criminal negligence. The components of criminal negligence are:

1. The defendant must have been under a legal duty to conduct himself in a reasonable fashion. Assumed.

2. A reasonable man would have foreseen that his voluntary act possibly or probably would cause the criminal result, in light of circumstances a reasonable man would have believed to be true. The defendant claimed that he had thought the gun wasn't

loaded. For this error to be a defense, three requirements must be satisfied:

(1) The error must have been a mistake of fact, not ignorance of law. The misconception concerned the facts (bullets in the gun) and so was a mistake of fact.

(2) The mistake of fact must have been operative. Where the crime is based upon criminal negligence, only a reasonable mistake of fact is operative. Here, a reasonable man could have assumed that the gun still had blanks in it and so the mistake could be considered to be a reasonable one.

(3) In light of the mistake, the event must not have constituted a crime. If the gun had been loaded with blanks a reasonable man still would have foreseen as possible or probable that a person with a weak heart might be frightened, suffer an attack, and die. Therefore, the event would still have constituted a crime and the mistake is not a defense.

3. The defendant must have acted in an unreasonable fashion, considering the balance of potential benefit v. risk of harm, in light of circumstances a reasonable man would have believed to be true. The potential benefit was trifling at best--a laugh from a stupid practical joke. The risk of death was great. A reasonable man would not have gone through with the gag even with blanks in the gun.

Therefore, the defendant would be criminally responsible under the statute for manslaughter for all components are satisfied: his voluntary conduct was a proximate cause of death and he was criminally negligent with respect to the death, in spite of mistake of fact.

GENERAL PRINCIPLES

III. Defenses
A. Mistake of fact
B. Infancy

Suppose a five-year-old child was playing in the bathtub with his younger brother. The older child held the younger one under the water and drowned him. According to what you have learned so far, the child might be in danger of criminal prosecution because his ignorance of the law of homicides would not be a defense.

But criminal punishment of a child would be unreasonable and ineffective if the child lacked the capacity to understand the regulation of conduct by law. Mere ignorance of the law is one thing, but the lack of capacity to know the law is another. Thus, even though ignorance of the law is usually not a defense, lack of ____________________ to know the law is a defense.

capacity

Lack of capacity to know the law is the basis of defenses such as infancy and insanity. First, you will analyze the defense of "infancy."

Legally all persons under twenty-one years of age are infants, but of course, not all "infants" lack the capacity to understand the law. Capacity or lack thereof must be proved in each individual case. Such proof may be difficult and so courts ease the problem by indulging in presumptions. At common law, if the child was at the time of the event less than seven, the courts irrebuttably presume that he lacked the capacity to know the law. An irrebuttable (unanswerable) presumption means that no amount of evidence can overcome the presumption. The defense is absolute. Thus, the solution is very easy. If the child proves that he was less than seven when the event occurred the defense is absolute because the courts indulge in the ____________________ ____________________ that he lacked the ________________ to know the law.

irrebuttable presumption

capacity

At common law, if at the time of the event, the child had passed his seventh birthday but had not yet reached his fourteenth birthday, the courts presume that he lacked the capacity, but the presumption is rebuttable: it could be overcome by evidence showing capacity.

Suppose a thirteen-year-old pleaded infancy as a defense. Neither he nor the state offered evidence of his capacity. Could the defense be successful?________ Explain:______________________

____

____

____

Probably. The defense would probably be successful because at common law the courts indulge in a rebuttable presumption of lack of capacity up to the age of fourteen, but here the state had offered no evidence to rebut the presumption.

At common law, if at the time of the event the defendant had reached his fourteenth birthday but had not yet reached his twenty-first birthday, the courts indulge in a rebuttable presumption that he had capacity.

Suppose a fifteen-year-old set up the defense of infancy and neither he nor the state offered evidence relative to his capacity. Would the defense be successful?_______ Explain:

Probably not. At common law the courts indulge in a rebuttable presumption that a defendant between fourteen and twenty-one years of age had the capacity and here the defendant had offered no evidence to rebut this presumption.

A person above the age of twenty-one is not an infant and thus cannot plead infancy as a defense. He may, of course, have some other defense based upon lack of capacity, such as insanity, but he can't claim lack of capacity due to infancy because he is not an infant.

Suppose attorneys for a person twenty-five years old proved that he had not developed mentally beyond a stage comparable to a twelve-year-old. They claimed that he should be treated as a twelve-year-old (rebuttable presumption of lack of capacity). Can he plead infancy as a defense?_______ Explain:______________________

____

No. He is not an infant and thus can't use the defense of infancy.

Statutes have modified these common law rules, but the problem still causes difficulty. Juvenile courts have been created for the specific purpose of solving such problems. The juvenile courts use principles quite different from the usual criminal courts. This special branch of the law will not be developed here.

SUMMARY OF GENERAL PRINCIPLES

III. Defenses
    A. Mistake of fact
    B. Infancy

1. Below age 7 -- irrebuttable presumption that the infant lacked capacity

2. Age 7 but not yet 14 -- rebuttable presumption that the infant lacked capacity

3. Age 14 but not yet 21 -- rebuttable presumption that the infant had the capacity

4. Above 21 -- not an infant (Note: May have lacked capacity for another reason)

GENERAL PRINCIPLES

III. Defenses
    A. Mistake of fact
    B. Infancy
    C. Insanity

Lack of capacity to know the law is the basis for the defense of insanity. Obviously, a good test for insanity is of critical importance but very difficult to formulate. Different tests are used in different jurisdictions. A common test is the "McNaughten Rule," which affords the defense of insanity if

1. The defendant had been laboring under such a defect of reason from a disease of the mind as to not know the nature and quality of the act which he was doing,

or

2. If he had known the nature and quality of his act, he did not know that what he was doing was wrong.

Note several points. First, the defendant must have a defect of reason from a ________________ of the mind.

disease

Thus, insanity is based upon a disease. One of the more vexing problems lawyers, psychiatrists, and psychologists have faced concerns what defects of the mind should be classified as "diseases." Views of persons in the field range from those who would require something as concrete as a brain tumor to those who accept psychosomatic principles without hesitation.

Note that in the McNaughten test, the disease of the mind must have one of two effects. The disease must either have caused the defendant not to know the "nature and quality of his acts" or "not to know that the act was wrong." The former is rarely argued because proof is so very difficult.

The disease of the mind may also have caused the defendant not to "know that his act was wrong." Since ignorance of the law is usually not a defense, the phrase "not to know that his act was wrong" means that the disease of the mind has deprived the defendant of the ______________________ to know the law.

capacity

Some states follow the McNaughten test and allow an additional defense on the basis of an "irresistible impulse." Of course, if the disease of the mind had caused the defendant to lose voluntary control over his acts, he would have a defense in any state, for the voluntary nature of the act is a basic requirement for all criminal responsibility. "Irresistible impulse" is a possible defense where the disease had not gone so far as to deprive the defendant of volition, but had deprived him of the power to choose between "right and wrong voluntary acts." Most states do not recognize "irresistible impulses" as a defense. A few do and treat the "act" as if it were not the product of the defendant, but the product of a disease of the mind resulting in an ______________________________ impulse.

irresistible

In those states recognizing the irresistible impulse, insanity is a defense if the defendant were suffering from a disease of the mind and if the disease caused one of three results:

1.____

2.____

____

3.____

____

1. the defendant had not known the nature and quality of his act;
2. the defendant had not known that the act was wrong (lack of capacity to know the law);
3. the defendant had been subject to an irresistible impulse to do the act.

Another test of insanity is the "Durham Rule." The defense applies if the defendant had been suffering from a disease of the mind or defective mental condition at the time of the event and the act was the product of such abnormality. Notice that again the defendant must have been suffering from a ____________________ of the mind.

disease

The McNaughten Rule requires that the disease have "caused" the defendant not to know the nature and quality of his acts or not to have known that his act was wrong (lack of capacity). The Durham Rule requires that the criminal act have been the product of the disease. Thus, the Durham Rule implies that the disease must have "________________" the criminal act.

caused or produced

Thus, all these tests of insanity are based upon mental ________________ which ________________ the criminal act or deprived the defendant of the ______________________ to know the law.

disease

caused

capacity

A related defense, sometimes called "partial insanity" or "insane delusions" is analogous to the defense of mistake of fact. The rule is:

> The defendant is not criminally responsible if the act would not be criminal (assuming that the "insane delusion" is true).

For example, suppose that a husband came home from work and found his neighbor in his house talking to his wife. The husband, due to an insane delusion, believed that the neighbor was about to stab the wife with a knife and that it was necessary to kill the neighbor to save her life. He killed the neighbor. Assuming that killing the neighbor to save his wife's life would not be a crime, would the defendant be criminally responsible?

_________ Explain:____

____

____

____

No. Assume that the insane delusion were true (that the neighbor was about to kill the wife) and the defendant's act was necessary to save her. Under these circumstances, killing the neighbor would not have been a crime and the defendant would not be guilty.

However, if the act would be criminal even though the insane delusion were true, the defendant may be guilty. Suppose in the last example that, due to an insane delusion, the husband believed that the neighbor was telling his wife lies detrimental to the husband's character, and so he killed the neighbor. Might the husband be criminally responsible for the neighbor's death?______

Explain:____

____

____

Yes. Assuming the insane delusion to be true (the neighbor was lying), killing him would not be justifiable and thus the defendant may be guilty.

Note: The question of the defendant's mental condition can be raised in different phases of the trial. In each phase the problem is different, but the same word--insanity--is used. This can be confusing unless you realize that the word "insanity" has a different meaning in each context.

1. The defendant may claim that he is insane at the time of the trial. The test is his capacity to understand the proceedings and assist his attorney in his defense. The effect of this type of insanity is to delay the trial.

2. The defendant may admit that he is presently sane, and so subject to trial, but claim that he had been insane at the time he committed the act. The tests are those discussed in this text (McNaughten, etc.). The legal effect of this type of insanity is a verdict of not guilty by reason of insanity.

3. After trial and conviction the defendant may claim that he is insane at the time he appears before the judge to be sentenced. The test is his capacity to understand the proceedings and appreciate the sentence. The legal effect of this type of insanity is to delay sentencing.

4. The defendant may be sentenced to death. He may claim insanity at the time the execution is scheduled. The test is his capacity to appreciate the punishment. The legal effect of this type of insanity is to delay execution.

SUMMARY OF GENERAL PRINCIPLES

III. Defenses
- A. Mistake of fact
- B. Infancy
- C. Insanity

1. McNaughten -- the defendant had been laboring under such a defect of reason from a disease of the mind as not to know the nature and quality of the act he was doing, or if he had known it, he did not know that what he was doing was wrong.

2. McNaughten coupled with "irresistible impulse" -- the defendant had not had the power to choose between "right" and "wrong."

3. Durham -- the defendant had been suffering from a disease of the mind or defective mental condition and the act was the product of such abnormality.

4. Insane delusions -- The rule is: the defendant is not criminally responsible if the act would not be criminal (assuming that the "insane delusion" is true).

GENERAL PRINCIPLES

III. Defenses
  A. Mistake of fact
  B. Infancy
  C. Insanity
  D. Drunkenness

As a general rule drunkenness is not a defense. Thus, to say, "I wouldn't have killed him if I had not been drunk!" is not a defense to homicide. However, one major qualification must be noted: involuntary drunkenness is a defense if the defendant had been so drunk at the time of the event that he was deprived of his reason. The test for involuntary drunkenness is whether or not the act of drinking alcohol had been involuntary (not the process of becoming intoxicated).

Suppose that a defendant went to a bar, ordered drinks, and drank them. He honestly desired to remain sober, to take just enough alcohol to relax. Was the subsequent drunkenness voluntary?

______ Explain:____

____

____

Yes. The test is whether or not the act of drinking had been voluntary. The fact that the process of becoming intoxicated was involuntary and contra to the defendant's wishes is immaterial.

The "involuntary" nature of the act must be evaluated in light of circumstances as the person believed to be true at the time of the event.

Suppose that a patient went to a doctor who gave him a large glass of a liquid to drink "to help him relax." The patient had thought that the liquid was some sort of medicine. Actually, it contained considerable alcohol. The person drank and became intoxicated. The act of drinking had been voluntary. Had the act of drinking alcohol been voluntary?________ Explain:

____

____

No. The case must be determined in light of circumstances as the defendant had believed them to be (the liquid was medicine, not alcohol).

Thus, the general rule that drunkenness is not a defense is qualified by the rule that involuntary drunkenness is a defense if the defendant had been so drunk that he was deprived of his "reason." What is meant by deprivation of "reason" is not entirely clear because the defense rarely is raised, and so judicial opinion on the defense is meager.

Even though drunkenness as such is not a defense, insanity, lack of a mental element--intention, recklessness, or criminal negligence--and mistake of fact will operate as defenses even though they may have been caused in part by voluntary drunkenness.

For example, if a person were insane, the insanity would be a defense, even though the excessive drinking and resulting drunkenness had been a major factor in the person's having become insane. In such cases, the defense is "insanity" not "drunkenness."

"Insanity" in this context usually refers to insanity which has continued over a period of time, and generally does not apply to specific isolated instances in which a person had become so drunk that he had not had, at that instant, the capacity to understand the law.

Suppose a person had been drinking heavily for about two years, and for the last six months had been just on the edge of consciousness. On a particular night he became roaring drunk. If he committed crimes at that time, criminal responsibility would depend upon ____

____

whether or not the insanity had continued over an extended period of time.

If the definition of a crime requires intention or recklessness, lack of such intention or recklessness is, of course, a defense, and this is true even though the defendant's voluntary drunkenness may have contributed to the lack of such intention or recklessness. In such cases, the defense is lack of intention or recklessness, but not voluntary drunkenness.

Suppose Allen at the bar was so drunk that he started breaking up the bar stools by smashing them against the bar, and in the process he smashed the bartender with a stool. He was charged with assault with intent to kill. Allen would not be criminally responsible if he had been so drunk that ____________________________

____

he had not intended to kill the bartender.

If Allen had previously decided to kill that bartender, and had gone to the bar for that purpose, his subsequent lack of intention due to drunkenness would not be a defense, because he would have had the necessary intention at the beginning of the event. But the intention at the beginning of the event and the act must have been close together in time.

Suppose Allen, in the previous case, had wanted to kill the bartender for some years, and had been in the bar night after night, but had not made any aggressive move. The night he killed the bartender with the stool he had become so drunk that he had lacked the necessary intention for murder in the first degree. Allen could not be guilty of murder in the first degree unless he had intended to kill the bartender the night of the event because the beginning of the event and the act must ______________________________

____

the intention and the act must have been close together in time.

In the last series of cases, drunkenness had deprived the defendant of the capacity to entertain the necessary intention or recklessness. In the next series of cases a mental element--intention, recklessness, or criminal negligence--is negated by mistake of fact.

Voluntary drunkenness could contribute to the defendant's having made a mistake. If the mistake of fact would be a defense, the fact that the defendant's drunkenness had contributed to the mistake is immaterial. The defense is mistake of fact, not drunkenness.

Suppose that a host had been drinking heavily and was mixing a drink for his friends. In his drunken condition he put rubbing alcohol (a poison), rather than vodka, in the drinks. A friend became quite ill after drinking one of the drinks. The host was charged with assault with intent to kill. He would not be criminally responsible because he had not intended to kill. He had not put the rubbing alcohol into the drinks in order to cause death nor, in light of circumstances he believed to be true (the bottle contained vodka), had he foreseen death as a substantial certainty. The defense is not drunkenness but lack of intention due to a ___________ of ___________.

mistake of fact.

Suppose the state argued that he wouldn't have made the mistake unless he had been drunk, so the mistake of fact should not be a defense. Answer the argument:______________________________

____

____

The facts are taken as the defendant himself had seen them, not as a reasonable man would have. The mistake doesn't have to be a "reasonable mistake;" therefore, the state's argument is immaterial.

Suppose the friend who had drunk the rubbing alcohol cocktail had died, and the host was charged with manslaughter. The definition of manslaughter may be satisfied by criminal negligence. Criminal negligence may be proved where a reasonable man would have foreseen the consequences in light of circumstances a reasonable man would have known. A reasonable man is a sober man. The host may be criminally responsible because ____________________

____

____

a reasonable man (a sober man) would have known that the bottle contained rubbing alcohol. In light of these circumstances, the result was foreseeable, and the defendant would be held criminally responsible for the result.

[Note: In effect the defendant does not get "credit" for an unreasonable mistake of fact and so an unreasonable mistake of fact is not a defense to manslaughter.]

SUMMARY OF GENERAL PRINCIPLES

III. Defenses
  A. Mistake of fact
  B. Infancy
  C. Insanity
  D. Drunkenness

As a general rule, drunkenness is not a defense. However, involuntary drunkenness is a defense if the defendant had been so intoxicated at the time of the event that he was deprived of his reason. The test for involuntary drunkenness is whether or not the act of drinking alcohol (not the resulting intoxication) had been involuntary.

Voluntary drunkenness is not a defense but may contribute to the defense of

1. insanity -- the insanity due to voluntary drunkenness applies only to continuous insanity over an extended period of time, not to isolated instances.
2. lack of intention or recklessness -- unless intention was formed before the defendant had become drunk.
3. mistake of fact -- defense to crimes requiring intention and/or recklessness, but not to crimes requiring criminal negligence.

GENERAL PRINCIPLES

III. Defenses
  A. Mistake of fact
  B. Infancy
  C. Insanity
  D. Drunkenness
  E. Consent

Many results which normally would be considered criminal may be lawful because the "victim" consented. Cutting a person with a knife would not be a criminal result when done by a surgeon with the ________________ of the patient.

consent

The consent may have been expressed verbally or it may have been implied by custom or conduct of the parties. Ordinary jostling in a crowded elevator usually would not be criminal because consent to a normal amount of contact is implied. However, there is no implied consent to an angry or hostile touching.

Thus, if a shopper pushed someone out of his way in a crowded elevator, the criminal character of the act would depend upon whether ____

____

____

the conduct would be treated as ordinary, normal contact and covered by implied consent, or whether the conduct would be considered as angry or hostile touching and therefore not covered by implied consent.

The defense of "consent" is subject to several important limitations. If a person exceeds the limits of consent, he may be held criminally responsible for the excess.

Suppose that during a football game a player tackled an opponent so hard that the opponent's leg was broken. Further, he held the opponent's face in the mud and gouged his eye. What argument could the player present against the opponent's charge of assault and battery?____

____

consent implied from playing the game.

A defendant's criminal responsibility for any particular result would be determined by deciding ____________________________

____

whether or not the particular result was beyond the limits of implied consent.

Another limitation is that the consent must have been voluntary, free from force, coercion, threats, etc.

Suppose a person threatened to kill a girl unless she submitted to him. She offered no resistance, and he had intercourse with her. He was charged with rape. What defense might be argued?____

consent implied from her submission.

Answer this argument:________________________________

____

consent must be voluntary. Since her submission had been obtained by coercion, the submission did not imply consent.

Fraud (misrepresentation) may or may not negate consent. Although courts are in some disagreement, the usual rule is that if the victim consented to the act, fraud in procuring the consent does not negate the consent.

For example, suppose a man went through a mock wedding with a woman so that she believed that they had been married and so consented to intercourse. The man would not be guilty of rape because ____

____

____

she had consented to the act of intercourse. His fraud (misrepresentation of marriage) in procuring the consent does not destroy the consent.

On the other hand, if the fraud had been such that the victim hadn't comprehended the nature of the act, the fraud negated the consent.

A physician told his patient that she required an operation. She consented, was anaesthetized, and the physician had intercourse with her. The fraud in this case was such that the victim hadn't comprehended the nature of the act; she had had no idea that the "operation" involved intercourse. Thus, the fraud negated consent to intercourse and the physician may have been criminally responsible for rape.

Mrs. Smith was asleep in her home. Mr. Jones crawled into bed with her, impersonated her husband, and had intercourse with her. He was charged with rape. His defense was consent. The state argued that his fraud negated any consent. What is the issue?______________

____

____

whether his fraud related only to procuring consent to have intercourse (consent not negated), or whether his fraud was such that the victim hadn't comprehended the nature of the act (consent negated). [Note: Courts are in disagreement on similar facts.]

Another limitation is that the defendant must have had the capacity to consent. The capacity may be destroyed by insanity, lack of mental ability, intoxication, etc.

Suppose Mr. Sanders went to visit Miss Palmer who was in bed with a cold. Sanders advised her to take some "medicine" he had brought with him. The "medicine" was a rather medicinal-tasting wine. After several "doses" Sanders told her that the medicine worked best if followed by intercourse, and she complied. He was charged with rape, and pleaded consent as a defense. The issue is whether or not ____

____

Miss Palmer had been so intoxicated at the time of the event that she had not had the capacity to consent.

A person may be too young to have the capacity to consent. Such "capacity" is very difficult to measure. Legislators have simplified the problem by statutes. For example, according to some statutes defining rape, acquiescence is not a defense if the girl was under 18 years of age at the time of the event. The question of individual capacity to consent is bypassed.

Courts as a matter of policy will not recognize consent given to acts which the state does not condone.

A patient in great pain in the terminal stages of cancer persuaded his doctor to kill him. The doctor's defense to a charge of murder was consent. Would consent be a defense?_______

Explain:____

____

No. The state does not condone mercy killings and so refuses to recognize consent to such an act.

Examples of other crimes in which the courts refuse to recognize consent are breach of the peace, incest, adultery, bigamy, violations of sex laws, etc.

Mr. Haller and Miss Hopkins were partners in a striptease act in a carnival. During a jungle dance Mr. Haller took off most of Miss Hopkins' clothes. They were charged with violation of various sex laws and he was charged with battery (an unlawful touching). His defense to the battery was that his partner had consented to his acts and so his acts had not been unlawful.

Answer him:____

The courts will refuse to recognize consent to acts which the state does not condone, such as acts in violation of laws regulating sexual activity. Thus, the acts were unlawful and consent would not be a defense to either the violation of the sex laws or to the battery.

SUMMARY OF GENERAL PRINCIPLES

III. Defenses
A. Mistake of fact
B. Infancy
C. Insanity
D. Drunkenness
E. Consent

An act which is normally unlawful may be made lawful by consent. Consent may be expressed or implicit. Normal contact in society is condoned by implied consent. Rude, angry or hostile contact is not. Consent is subject to the following limitations:

1. The consent may be exceeded and the defendant criminally responsible for the excess.

2. The consent must be voluntary. Force, coercion, threats, etc., may negate an apparent expressed or implied consent.

3. Consent may or may not be negated by fraud.
   a. Fraud in procurement of consent ordinarily does not negate consent.
   b. Fraud such that the victim does not comprehend the nature of the act ordinarily negates consent.

4. Consent may be given only by a person having capacity to consent. Capacity may be destroyed by insanity, intoxication, lack of mental ability, etc.

5. Courts will not recognize consent given to acts which the state does not condone, such as breach of peace, mercy killing, various sex crimes, etc.

Lewis and Potter were opponents in a wrestling match. Lewis told Potter that the management at the gym had authorized the use of karate. This was not true. As Potter climbed into the ring his foot caught in the ropes and he twisted his ankle. In the match Lewis took advantage of the tender ankle, tripped Potter, pounced on him and broke his nose with a karate blow. Assume that the requirements of assault and battery are satisfied as to the tripping and the karate blow. Further, assume that karate was prohibited by statute. Discuss consent as a defense to assault and battery by the act of tripping and also by the karate blow.

The defendant, Lewis, could argue that by engaging in the match Potter had consented by implication to the usual or normal contact. Tripping is usual and normal in wrestling. Thus, consent could be a defense to a charge of assault and battery based upon the tripping.

The defendant would argue consent to the karate blow as well. The state might argue that since the defendant had lied to Potter about the management's authorization of karate, the consent was negated by fraud. However, not all fraud negates consent. The usual rule is that if the fraud is such that the victim doesn't comprehend the nature of the act, fraud negates consent. If the defendant consented to the act (comprehending the nature of the act) fraud in procuring consent does not negate the consent. Here, Potter had known the nature of karate; the fraud, then, relates only to procuring the consent, and the consent is not negated by fraud. The defendant would prevail on this point.

However, the state could also argue that as a matter of policy the courts will not recognize consent given to acts it does not condone. Karate is dangerous and prohibited. Therefore, the court, on the basis of this policy, might not recognize the consent, and the defendant could be criminally responsible for assault and battery based upon the karate blow.

PARTICULAR CRIMES

I. Battery

A. Essential elements

The general principles of criminal responsibility involve a voluntary act which was the cause of a criminal result, and a mental element--intention, recklessness, or criminal negligence. Particular crimes are composed of various essential elements. These essential elements incorporate the above general principles and define them more specifically. Usually the exact words "voluntary," "proximate cause," "criminal result," etc., will not appear in the definition of the crime but they are implied and included in the essential elements. For example, the essential elements of battery are (1) the use of force so as to (2) cause (3) injury to the person of another. The expression "voluntary conduct" is not used, but is implied by the words "use of force."

The first essential element for battery, then, requires that the act must have been ________________________ and have involved the use of ______________.

voluntary

force

The "use of force" implies voluntary conduct. Of course, the courts have determined that the "use of force" must be accompanied by a mental element. Thus, the essential element of "use of force" by implication (rather than by direct expression) incorporates the two following general principles of criminal responsibility: ________________ ____________________ and a ______________ __________________.

voluntary conduct

mental element

(Note: All the rules concerning voluntary conduct and mental element apply.)

The use of force must have caused injury to the person of another. Thus, the second essential element directly incorporates the general principle of causation and all the rules of causation apply.

The third essential element is injury to the person of another. This, of course, is the criminal result--the factor which is the distinguishing feature of each particular crime. Criminal responsibility requires that the defendant have caused a criminal result, and for battery that criminal result is an ______________ to the ________________ of another.

injury

person

This brief description illustrates how the essential elements of battery include all the general principles of criminal responsibility and define them more specifically. Now you will study each element in more detail.

The first essential element of battery is the "use of force" (volition implied). While Morgan was standing on a corner waiting for a traffic light to change, a car hopped the curb, hit him in the back, and threw him against another pedestrian. Morgan could not be guilty of battery against the pedestrian because bumping into him was not conscious and deliberate, and thus was not a

_________________________ act.

voluntary

The act must have been forceful. This requirement is satisfied almost automatically, for the slightest force will do. Sanders asked his date for a kiss. She refused. When her head was turned, he kissed the back of her neck tenderly. The act, though very mild, would satisfy the requirement of a forceful act because the ____

____

slightest force is sufficient.

Suppose that when his date had refused to be kissed Sanders had said, "Kiss me or I'll kill you." She had turned and run. Would the first element of battery have been satisfied?

________ Explain:____

____

No. His conduct had not constituted a forceful act.

The use of force must have been accompanied by a mental element. You recall the general rule that if the definition does not require intention, usually either intention or recklessness will suffice. Since the definition of battery does not express or imply that only intention will suffice, the definition may be satisfied by either __________________ or ______________________.

intention or recklessness

Usually criminal negligence will not suffice. Thus, according to the general rule, you would not expect that criminal negligence could satisfy the requirements of battery. However, courts in some states have held defendants criminally responsible for battery on the basis of criminal negligence. Thus, generalities must always be checked by an analysis of previous cases, or ____________________.

precedent

The second essential element of battery is that the voluntary forceful act of the defendant must have been a proximate cause of the criminal result (injury to the person of another).

Suppose Able whipped the horse that Baker was riding. The horse bolted and Baker was thrown. Able may have been criminally responsible even though he whipped only the horse--not Baker--because his act was a __________________ cause of Baker's injury.

proximate

Since all the general principles of causation that you have learned [pages GP 7 through GP 27] apply to battery, it is not necessary to repeat them here.

The next essential element is the criminal result--the injury to the person of another. This is the element which distinguishes battery from all other crimes. The injury need not have been serious. The very slightest bodily contact from the slightest force will do. The slightest touching in a rude, hostile, angry, or violent manner is sufficient.

Suppose Johnson spat in Smith's face. His defense was that no injury had occurred. Would this be effective?_________

Explain:____

____

No. The slightest bodily contact is an injury and is sufficient.

The injury must have been to the person of another. Thus, if Mason stole Arthur's Rembrandt painting, the act could not be battery even though it caused Arthur great pain and anguish, because it was directed against Arthur's right of possession, rather than against his ________________.

BA 12

person

Recall the case in which Sanders had been refused a kiss and had said, "Kiss me or I'll kill you." The first essential element was not satisfied because the conduct had not constituted use of force. This essential element would not be satisfied either because Sanders' conduct had not ______________________________

____

constituted an injury to the person of another.

The injury must have been to the person of another. This element may be satisfied even though the person was not directly touched if force were applied to something intimately associated with his body. Cole hit Randle on the back. The fact that the blow touched Randle's shirt rather than his skin obviously is immaterial.

If Miss White snatched a book from Miss Black's hand, the act could be a battery even though Miss Black was not touched because ______________________________

____

the act had been directed against something intimately associated with the body of another.

PARTICULAR CRIMES

- I. Battery
  - A. Essential elements
  - B. Defenses
    - 1. Privileged contact
    - 2. Consent

Battery involves the use of force so as to cause an injury to the person of another. Since the slightest injury is sufficient, and since a certain amount of body contact is unavoidable in normal living, some limitations are necessary. Two common defenses are privileged contact and contact condoned by expressed or implied consent.

Privileged contact frequently involves acts by officials necessary for governmental functions. If a police officer handcuffed an escapee the officer would not have committed a battery because his act would have been ________________________.

privileged

Consent may be expressed or implied. The act of a surgeon during an operation doesn't constitute battery due to the expressed, written consent given by the patient. Suppose a doctor saw a person on the street unconscious from a heart attack, and treated him immediately by giving him a life-saving injection. The doctor's act would not have constituted a battery because such treatment would be condoned by ________________ ______________.

implied consent

A normal amount of contact is necessary in our society, such as ordinary jostling that might occur at a bargain counter. Such contact is condoned by implied consent. But courts do not imply that a person consents to a rude, angry, hostile, or violent contact.

Suppose that Walker and another pedestrian were each trying to get on a subway train ahead of the other. Walker pushed the pedestrian so hard that he fell. Whether or not this act would have constituted battery would depend upon ____________________

____

____

whether such pushing was normal in subways and thus condoned by implied consent, or so rude, angry, hostile, or violent that no consent would have been implied.

The general principles of consent that you previously learned apply. [Perhaps a review would be appropriate: pages DE 59-72]

A dentist told his patient that the patient's gold-filled tooth was abscessed and should be pulled. This was not the case; the dentist merely wanted to take the tooth out and steal the gold. The patient gave permission and the dentist pulled the tooth. The act certainly was fraudulent, but would it have constituted a battery?_________ Explain:____

____

____

No. The patient had consented to the act. The consent had been obtained by fraud, but where fraud related only to procuring the consent, the fraud does not negate the consent.

A young lady was enjoying the attention and kisses of her lover. In one embrace, he squeezed her so hard she cried out in pain and struggled against him. He held her long enough to finish the kiss. Would his first kisses have constituted battery?______

Explain:____

____

No. She had consented to his first kisses.

Could his final kiss have constituted a battery?_______

Explain:____

____

____

Yes. Consent may be exceeded and not condoned to the extent of the excess. Thus, holding the girl after she had tried to resist was excessive, not condoned by consent.

Two persons in a bar had a terrible argument and agreed to fight it out right on the premises. They created a great disturbance, destroyed property, and injured each other. They were both arrested and charged with the crimes of "breach of the peace" and battery. Each defendant admitted the breach of the peace, but defended against the charge of battery on the basis of mutual consent. Would this defense be effective?_______ Explain:

____

____

____

____

No. The state as a matter of public policy will not recognize consent given to acts which the state does not condone. The state does not condone a breach of the peace, and since the battery would be derived from the same acts that constituted the breach of peace, the defense against battery would fail.

SUMMARY OF PARTICULAR CRIMES

You recall that the essential elements of each crime incorporate the general principles of criminal responsibility. Sometimes an essential element will be expressed directly in terms of a general principle of criminal responsibility. Where there is no direct expression, the essential elements incorporate the general principles by implication. Notice in the following summary how the essential elements either by direct expression or implication incorporate all of the general principles of criminal responsibility (voluntary conduct, causation, criminal result, mental element--intention, recklessness, or criminal negligence).

I. Battery

Battery is the use of force so as to cause injury to the person of another.

A. Essential elements
  1. The use of force
     This essential element, by implication, incorporates the general principles of (a) voluntary conduct accompanied by (b) a mental element.
     a. The slightest force is sufficient.
     b. Generally, the force must be accompanied by intention or recklessness; however, some courts have held that criminal negligence will suffice.
  2. Causation
     The use of force must have been the proximate cause of injury to the person of another (general principle of causation expressed directly).

  3. Injury to the person of another
     This essential element is the explicit definition of the criminal result which distinguishes battery from other crimes.

     Injury must be to the person of another; however, this essential element is satisfied if the force had been applied to something intimately associated with the body of the victim.

B. Defenses to battery
  1. Privileged contact
  2. Consent
     a. Expressed
     b. Implied

A thief on a crowded street corner snatched a small bag from a doctor's hand and ran down the sidewalk in order to escape. The doctor was on his way to make a house call, and the bag contained medicine which his patient needed immediately in order to live. The doctor ran after the thief in order to recover the medicine, and knocked down several pedestrians in the process. Could the doctor be guilty of battery?

A battery is the use of force so as to cause injury to the person of another. The first essential element is the "use of force." This element is obviously satisfied because the doctor ran into the pedestrians with sufficient force to knock them down.

(Note: The use of force implies voluntary conduct, but the voluntary nature of the use of force is not in doubt or issue, so need not be discussed. If, for example, the doctor had been standing on a corner and a car had hit him and thrown him against a pedestrian, the force would not have been voluntary. In such a case your argument would be that the essential element of "use of force" would not be satisfied because the doctor's conduct had not been voluntary. The "use of force" also implies that the act must have been accompanied by a mental element. The facts do present a problem here, and so must be discussed as follows.)

Usually courts require that the use of force be accompanied by intention or recklessness. Some courts accept criminal negligence. (Note: Resolve the problem by the use of precedent. Assume here that the court trying this case had habitually required intention or recklessness.) Intention would be difficult to prove. The tests for intention are that the defendant had used force in order to cause the injury to the person of another, or had foreseen the injury as substantially certain. The defendant hadn't run down the sidewalk in order to injure the pedestrians, and injury had not been inevitable--the defendant hadn't foreseen the injuries as substantially certain. Since the defendant had not intended the injuries, the court would next consider recklessness.

The components of recklessness are:

1. The defendant must have been under a legal duty to conduct himself in a reasonable fashion. Assumed.

2. The defendant himself must actually have foreseen that his voluntary act possibly or probably would cause the criminal result, in light of circumstances the defendant believed to be true. Certainly, the defendant had foreseen the possibility or probability of injury to the last pedestrian he had run into because of his experience with the first one he had hit.

3. The defendant must have acted in an unreasonable fashion, considering the balance of potential benefit v. the risk of harm, in light of circumstances the defendant believed to be true. The benefit was potentially great (saving his patient's life). The risk of great harm seemed relatively less (knocking down a pedestrian). Therefore, a reasonable man probably would have chased the thief and so the doctor's act was not unreasonable. Therefore, the defendant was not reckless.

The second essential element of battery (proximate cause) and the third element of battery (injury to the person of another) are so obviously satisfied that no discussion is needed.

The defendant would not be guilty of battery because neither intention nor recklessness was satisfied by the facts.

(Note: The defense of consent would not apply. The pedestrians obviously didn't expressly consent and no consent would be implied to a violent force.)

PARTICULAR CRIMES

II. Attempts (including Assaults)

You learned from the discussion of battery that the essential elements of each crime incorporate by expression or implication all the general principles of criminal responsibility. Battery was also used to show that the particular crime is discussed in terms of the essential elements and the general principles are incorporated as needed in the discussion of the essential elements. Answers to examination questions are handled in the same fashion. Since this procedure for discussion has been illustrated by the crime of battery, it will not be repeated for the remainder of the particular crimes.

Jackson shot at Lee but missed. Jackson didn't commit murder because he hadn't killed anyone. However, he had attempted to kill Lee and may be criminally responsible for his unsuccessful ____________________.

attempt

Thus, you see, a person may be criminally responsible for an unsuccessful attempt to commit a crime. In this sense an "attempt" is itself a crime; thus, you must learn the essential elements of an "attempt."

The first essential element of criminal attempts is that the attempted result, if completed, would have constituted a criminal result. In the previous case, Jackson would have been criminally responsible for attempted murder because his attempt, if it had been completed, would have constituted a crime--murder.

But suppose Jackson was a member of a firing squad ordered to execute Lee, a spy. If Jackson missed he would not be criminally responsible for attempted murder because ______________________________

____

the attempt, if completed, would not have been a crime but a lawful execution. (Note that the term "defense of impossibility of law" is used by some to indicate that the attempted result, if completed, would not constitute a crime. This term will not be used in this text, but you will find it in some cases and texts and should understand its meaning.)

If a person attempted to accomplish a result which would constitute a crime, he could be criminally responsible for a criminal attempt, even though he didn't know that his intended result would constitute a crime.

Suppose that a Sunday school superintendent was about to conduct a raffle to get money for a Sunday school picnic. He was stopped by police because the raffle was in violating of gambling laws. Even though he hadn't known that the raffle was a violation, he could be guilty of a criminal attempt because

____

____

the particular result he attempted to accomplish (raffle), if completed, would have constituted a crime (gambling). Ignorance of the law is no defense.

On the other hand, a person may have thought that the result he had attempted to accomplish was a crime; but if, in fact, it is not a criminal result, the defendant could not be guilty of a criminal attempt.

Suppose an eighteen-year-old boy thought that a criminal statute prohibited a minor from buying tobacco. No such statute existed. He went into a store and asked for a pack of cigarettes, but discovered that he only had a dime and so couldn't complete the purchase. Even though he had attempted an act that he had thought would be a crime, he is not guilty of a criminal attempt because ______________________________

____

the particular result that he had attempted to accomplish (buying tobacco) does not constitute a crime.

So, you see, the first essential element of criminal attempts is not affected by the defendant's knowledge of whether or not the attempted result is a crime. The requirement is that the attempted result, if completed, would have ____________________

____

constituted a crime

The first element--that the attempted result, if completed, would have constituted a crime--is simple enough, but the decisions are in conflict. The reason for the conflict is that some courts take the facts as the defendant believed them to be, while other courts take the facts as they actually were.

Suppose Palson was arrested just as he was on the verge of buying jewels from a notorious jewel thief, Wilson. Palson, of course, thought that the jewels were stolen property. Actually, Wilson owned them legitimately. Palson was charged with attempting to receive stolen property. In those courts which take the facts as the defendant believed them to be (the jewels were stolen property) the first element of "attempt to receive stolen property" would be satisfied because the attempted result, if completed, would have constituted the crime of receiving stolen property.

In those courts which take the facts as they actually were (jewels were not stolen), the first element could not be satisfied because ____

____

the attempted result, if completed, would not have constituted the crime of receiving stolen property.

(Note: Some courts take the facts as the defendant believed them to be. Others take facts as they actually were. The former view is consistent with the law of mistake of fact, where, as you recall, the court takes the facts as the defendant believed them to be. Thus, the former view is preferred, for in these cases the defendant had made a mistake of fact--he mistakenly had thought the jewels were stolen.)

Smith and Jones traded "wives" for a week. The police intervened and arrested all parties just as Mr. Smith and Mrs. Jones were going to bed. Subsequently, it was discovered that both "marriages" were invalid. Adultery is intercourse by a married person with someone other than the spouse. Mr. Smith and Mrs. Jones were charged with attempt to commit adultery. Could the first element of attempted adultery be satisfied?_______ Apply both views:____

____

____

____

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____

____

In courts which take the facts as the defendants believed them to be (they were married but not to each other), the first element of attempt to commit adultery could be satisfied because the attempted result, if completed, would have constituted the crime of adultery.

In courts which take the facts as they actually were (parties not married at all), the element would not be satisfied because the attempted result, if completed, would not have constituted adultery.

Butter took a book he thought belonged to his partner. Actually, the book was his own. Larceny involves taking the property of another. Butter was charged with attempted larceny. Could the first element be satisfied?_______Apply both views:

____

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____

____

In courts which take facts as the defendant believed them to be (book belonged to another), the first element of attempted larceny could be satisfied because the attempted result, if completed, would have constituted the crime of larceny.

In courts which take facts as they actually were (book belonged to the defendant), the element could not be satisfied because the attempted result, if completed, would not have constituted larceny.

As you have noticed, the term criminal attempts may apply to any crime--attempt to gamble, attempted murder, attempted larceny, attempted rape, etc. An attempted battery is called an assault. Assaults require special consideration because although the essential elements of an assault are generally the same as other criminal attempts, there are some variations. Assaults will be discussed along with criminal attempts in general and the variations noted as they arise.

The first essential element, then, of an assault is that the attempted result, if completed, would have constituted a __________ battery

Suppose a patient fainted as the doctor advanced to give him a hypodermic injection. Would the first element of assault be satisfied?________ Explain:________________________________

____

____

____

No. The first element of an assault is that the attempted result, if completed, would have constituted a battery. Since the patient had consented, the attempted result (an injection) would not have been a battery.

The concept of an attempt implies an intention to accomplish a specific result. Recklessness or criminal negligence will not suffice.

Suppose Lester, driving carelessly, hit and injured a pedestrian. The evidence indicated that Lester was hurrying to his office, preoccupied with saving his business from bankruptcy. Lester would not be guilty of attempted murder because ____________

____

____

____

____

where the defendant is charged with attempted murder, the state must prove intent to kill. The facts fail to show such intent. Lester hadn't driven in order to kill the pedestrian, nor had he foreseen death as substantially certain.

Suppose Jordan set fire to his mother-in-law's home in order to burn it to the ground. Unknown to him, she had been inside and was badly burned, but didn't die. Could Jordan be guilty of attempted murder?_______ Explain:_____________________

____

____

____

No. Attempts requires an intention to accomplish a specific result. Jordan hadn't burned the house in order to kill his mother-in-law, nor had he foreseen that her death was substantially certain.

Black shot at Brown in order to kill him, but missed and wounded Gray, who recovered. Black was charged with attempted murder of Brown. Would the intention requirement be satisfied?

_______Explain:____

Yes. Black shot at Brown in order to kill him.

Suppose the defendant were charged with attempted murder of Gray. Some courts would hold that the intention requirement was satisfied and others would not. Upon what would the decision depend?____

upon whether the court applied the concept of transferred intent to attempts. Since the defendant hadn't shot in order to kill Gray, and assuming that he had not foreseen Gray's death as substantially certain, he hadn't intended to kill Gray. Thus, the necessary intention would not be satisfied unless the court "transferred" the intention to kill Brown to the intention to kill Gray. Some courts apply transferred intent to attempts. Others do not.

Generally the intention must have been to commit some specific crime. Criminal responsibility for the crime of assault depends upon intention to commit a battery (injury to the person of another).

Suppose Stoker shot at Blake's feet in order to cripple him, but missed. He could be criminally responsible for assault because ____

Stoker had intended to cause bodily injury.

The law of assaults is complicated by a few decisions. For example, suppose that a defendant was found guilty of assault when he aimed a gun he knew to be unloaded at a victim who believed it to be loaded. Such a decision would not be justified under the rules you have just learned. To reach such a decision two exceptions must be made. The first essential element of assault is that the attempted result, if completed, would have constituted a battery--bodily injury. This must be expanded to include not only bodily injury but mere apprehension by the victim of bodily injury, and some courts go so far as to accept "reasonable" apprehension of bodily harm. The second modivication involves the intention to cause a battery. This concept must be expanded to include an intention to cause apprehension of bodily injury.

Suppose a person threw a rock close to another person merely intending to frighten him. According to the usual rules, the rock-thrower could not be guilty of an assault. According to the modifications, the person who threw the rock could be criminally responsible for an assault. The attempted result, if completed, would have constituted apprehension of bodily injury (modification of first essential element) and the rock-thrower had intended to cause apprehension of bodily injury (modification of intention).

The second essential element of attempts is that the attempt must have been unsuccessful--the attempted criminal result must not have been accomplished. If the attempt were accomplished a completed crime would result such as murder, rape, larceny, etc., rather than attempted murder, etc.

Suppose Kelly pushed the screen out of a window in Barber's house and crawled in in order to steal a Rembrandt painting. He was caught just as he reached up to remove the painting from the wall. Burglary is the breaking and entering the dwelling of another with intent to commit a felony therein. The crime is complete when the entry is accomplished, for it is not necessary to commit the felony but only to have intended to do so. Would the second element of attempted burglary be satisfied in Kelly's case?______

Explain:____

____

____

No. The attempt must have been unsuccessful. The burglary was complete when the entering occurred (not necessary to have committed the intended felony, taking the picture).

Larceny involves the taking and carrying away of the personal property of another with intent to cause unlawful permanent deprivation. The crime is complete when the property is carried away, with intent to permanently deprive. Would the second element of attempted larceny be satisfied by facts in the previous case?________ Explain:____

____

____

____

Yes. The attempted result must have been unsuccessful. Larceny is not complete until the property is carried. Since the defendant had not yet touched the painting, his conduct could be attempted larceny but not larceny.

Thus, in effect, a completed crime "absorbs" the attempt. As a general rule, if the crime were completed, the defendant would be prosecuted only for the completed crime; however, exceptions may be made by statutes which give the state the election to prosecute for either the attempt or for the completed crime.

Assaults are an exception also. If bodily injury had occurred, you would assume that the battery would "absorb" the assault and the prosecution would be only for the battery. However, in such cases, prosecution for "assault and battery" is not unusual.

Usually the act must have been unsuccessful in the sense of having failed to accomplish the murder, rape, larceny, etc. On the other hand, the act must have been well on the way toward completion of the intended crime--the act must have gone beyond mere preparation. The third essential element of attempts is that the voluntary conduct of the defendant must have gone beyond mere preparation.

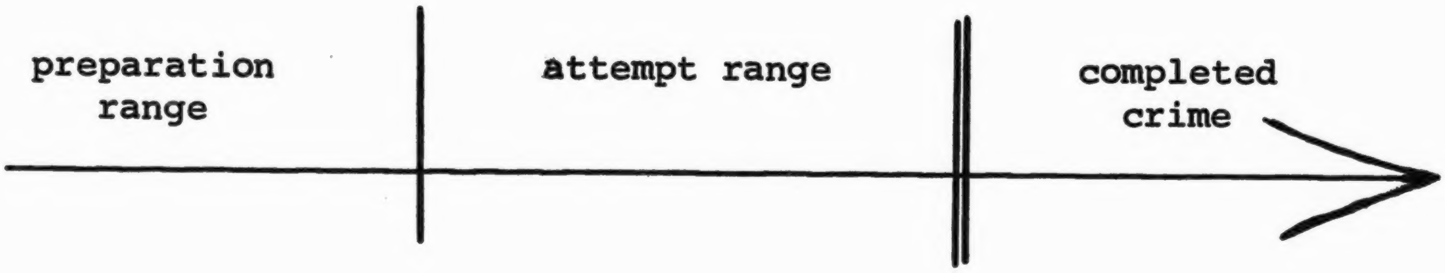
Suppose that Watson intended to kill his boss by poison. He knew very little about poisons and so went to the library to get a book. There he found that he needed a library card and filled out the necessary application. Obviously, filling out an application for a library card would not make Watson criminally responsible for attempted murder because ______________

____

Watson's conduct had not gone boyond preparation.

Thus, diagramatically, the situation is this:

CONDUCT OF THE DEFENDANT



The "attempt range" is in between the single line and the double lines. A person would not be criminally responsible for attempted murder until his conduct had passed beyond mere preparation, and usually he would not be responsible for attempted murder if he had completed the crime of murder. Thus, to be guilty of a criminal attempt, his act must be within the "attempt range." The "attempt range" is beyond mere ______________________, but has not reached the completed _____________.

preparation

crime

Watson received his library card, chose a book, and read it. He decided on cyanide and stole some from a chemistry laboratory. He then invited his boss to dinner, made coffee, put cyanide in the coffee, and served the coffee. His boss drank the coffee and became ill, hovered between life and death for two weeks, and then died. It is easy to draw the line between attempted murder and murder, or in general, the final act which completes the crime (such as "entering" for burglary or "carrying away" for larceny). The difficult problem is drawing the line batween mere ____________________ and the "______________ ________________."

preparation

"attempt range"

There are so many varied possibilities that the formulation of one test to draw the line between mere preparation and the "attempt range" that would work well for all cases would be extremely difficult. As usual, rely upon precedent. Some helpful guides do exist:

> If the act alone (without supporting extraneous evidence such as confessions) would be sufficient to prove intent, the act probably is beyond preparation and into the "attempt range."

Suppose Watson served his boss the poisoned coffee, but his boss hadn't drunk it. Had Watson's acts gone beyond preparation?

_____ Explain:____

____

____

____

Yes. Generally, if the defendant's acts alone would have been sufficient to prove intent, the acts were beyond preparation. In this case, his acts alone would be excellent evidence of intent to kill his boss, and thus probably would be considered within the attempt range.

Another safe generalization is this:

> If the defendant has done the last act required of him and the criminal result would occur in the normal course of events, the conduct has gone beyond preparation and is in the "attempt range."

Thus, if a person aimed at his victim and pulled the trigger but the shot missed, his conduct had gone beyond mere preparation into the attempt range because________________________________

____

____

the person had completed the last act required of him (pulling the trigger) and the criminal result ordinarily would occur in the normal course of events.

If the defendant had not done the last act required of him, his conduct may still have been beyond preparation and into the "attempt range," but in such cases the line is very, very difficult to draw. Perhaps the most general statement of policy is this:

> A person is not criminally responsible for evil intent alone; but neither should he be free of criminal responsibility for acts just short of a completed crime.

Criminal responsibility should attach before acts which are just short of a completed crime. But where? Not when a person gets a library card, for such an act is too innocent, too far removed from killing. The act must have come "dangerously close" or have been such that the occurrence of the criminal result was "highly probable." At this point the conduct has passed from mere preparation into the attempt range.

In the poison case, different persons would disagree as to when the act became "dangerously close" and the criminal result "highly probable." Some might draw the line when Watson obtained the poison; others might say when the boss arrived for dinner; others might say when Watson put the poison into the coffee--but all would justify their decision on the basis of a policy that criminal responsibility for the criminal attempt should occur when the act became ______________________ ______________ and the criminal result became __________________ ____________________.

dangerously close

highly probable

Suppose Jackson wanted to beat Lawson to a pulp (battery), so he set out driving the streets looking for him. Would Jackson's acts have gone beyond prepatation into the "attempt range"?_________ Explain, applying all the general guides.

AT 29

No. His acts alone without extraneous evidence would not prove an intention to cause bodily injury; he had not completed the last act required of him in order to accomplish the bodily injury; and he had not come dangerously close to causing bodily injury, and such would not be highly probable until Jackson had at least located Lawson.

Now to the last essential element of criminal attempts. Sometimes the intended crime was not completed because the means used was inadequate. Consider these cases:

> A person tried to kill his guest by adding the following ingredients to his coffee--
>
> 1. a powder from a bottle labeled "Poison--sodium cyanide." In fact, the powder was sugar.
> 2. one poison pill. The person thought that one pill was sufficient. In fact, five was the minimum lethal dose.
> 3. five aspirins. The person mistakenly believed that his guest was allergic to aspirin.
> 4. two lumps of sugar. The person believed that sugar was the most deadly poison known to man.

Such cases raise the problems of "how adequate" the means must be. The courts are not in agreement. At least three tests for the "degree of adequacy" required have been used. One test is:

The means must in fact be adequate.

Using this test, would the means have been adequate for killing the guest in any of the four cases?______ Explain:________________

____

No. None of the means was in fact adequate.

Most courts would feel that in at least some of the four cases, the defendant should be criminally responsible, and thus would prefer a less restrictive test, such as:

> The means must have appeared adequate to the defendant in light of circumstances he believed to be true.

Using this test, would the means have been adequate in any of the four cases?________ Explain:____

____

____

Yes. The means in each case appeared adequate to the defendant in light of circumstances he believed to be true.

This test imposes very little limitation. Some courts prefer a third test which is less restrictive that the first test, but more limiting than the second. The third test is:

> The means must have been reasonably adequate--that is, must have appeared adequate to the defendant and also would have appeared adequate to a reasonable man in his place.

Using this test, would the means have been adequate in any of the four cases?_________Explain:______________________________________

____

____

____

____

Yes. The first three could be bases for criminal responsibility because a reasonable man could have believed that the powder or pill or aspirin would cause death. The fourth could not be the basis for criminal responsibility because a reasonable man would not have believed that sugar was a deadly poison.

In the vast majority of cases, the last essential element--"adequacy of the means"--is determined by either the second or third test, and the distinction between these two becomes important only if the means is quite unreasonable. Since neither the second nor third test requires that the means actually have been adequate, the fact that completion of the crime would be impossible by the means the defendant employed would not be a defense.

(Note: The term "defense of impossibility of fact" is used by some to indicate that the means is inadequate by any of the three tests. This term will not be used in this text, but you will find it in cases and texts and should understand its meaning.)

Suppose Lewis shot at Schwartz with a gun Lewis thought was loaded with bullets, but which contained only blanks. Using the second test, even though the attempt to kill Schwartz was by physically impossible means (blanks), Lewis would be guilty of an attempt to commit murder because ________________________________

____

the means was apparently adequate to Lewis in light of circumstances he believed to be true (gun loaded with bullets).

Washington thought Mrs. Astor's jewel box was made of stainless steel. He tied a strong magnet on the end of a pole and stuck it through a window in an effort to "fish" the box off her dresser. The box was made of silver and therefore the magnet couldn't hold it. Washington was charged with an attempt to commit larceny. On the basis of the second test, was the means adequate?________Explain:____

____

Yes. The means appeared adequate to Washington in light of circumstances he had believed to be true (box was stainless steel).

In the last few cases the act was unsuccessful because accomplishment of the result by the means used was physically impossible. The act may have been unsuccessful for other reasons--the defendant may have stopped voluntarily or have been stopped by a third party. In such cases, he may be guilty of a criminal attempt if the act had gone beyond preparation and were an adequate means of accomplishing the intended result.

Welch planned to kill his enemy. He put a bomb under his enemy's bedroom window, lit the fuse, and ran a safe distance away. He had a moment of compassion and regret, ran back, and jerked the fuse out. He could be guilty of attempt to commit murder even though he voluntarily pulled the fuse because ________

____

____

____

his act had gone beyond preparation and was an adequate means of accomplishing the intended criminal result. (Note: Some authorities consider that voluntary withdrawal from the commission of the crime by the defendant should be a defense.)

Again, the law of assaults requires special consideration. Where a defendant has been charged with assault, the courts have used the three tests for adequacy which you just learned, plus a fourth:

> The victim must have reasonably believed that the means was adequate.

McIntosh pointed a gun he knew was unloaded at the intended victim who reasonably believed it was loaded. Apply all four tests to determine if the means was adequate for purposes of an assault:____

____

____

____

____

____

In states which require adequate means according to the three usual tests for attempts, the element would not be satisfied because neither the defendant nor a reasonable man in his place would have believed that the means was adequate.

Where the test is that the victim reasonably believed the means to be adequate to accomplish the result, the element would have been satisfied because the victim hadn't known the gun was not loaded.

Another term with which you should be familiar is "aggravated assault." This applies to at least two common situations:

1. where the assault involved a deadly weapon; and
2. where the defendant attempted to commit a crime involving bodily injury of a greater degree than a battery--rape, murder, etc. Such crimes are frequently called "assault with intent to rape," "assault with intent to murder," etc. The essential elements of criminal attempts in general apply to these crimes.

SUMMARY OF PARTICULAR CRIMES

II. Attempts (including Assaults)

A. An attempted result which, if completed, would have constituted a crime

1. Where the defendant was mistaken as to the facts, some courts apply the facts as the defendant had believed them to be; others apply the actual facts.

2. Ignorance by the defendant of the fact that the result would constitute a crime is no defense. "Ignorance of the law" is no excuse.

*[Assault: The attempted criminal result, if completed, would constitute a battery. In some courts the defendant may be criminally responsible if he caused another to be in apprehension of bodily harm.]

3. Intention. An attempt implies intention to accomplish a specific result.

   a. The defendant must have intended to accomplish the criminal result. Recklessness or criminal negligence will not suffice.

   b. Some courts apply the concept of transferred intent to attempts. Others do not.

   *[Assault: The defendant must have intended to cause
   (1) bodily injury (a battery);
   (2) or in some courts, the defendant must have intended to cause apprehension of bodily injury;
   (3) or some courts go so far as to hold the defendant responsible if the victim were put in reasonable apprehension of bodily injury.]

B. Attempt not successful (The crime intended was not completed.) Usually if the attempted crime is accomplished, the completed crime absorbs the attempt. Statutes in some states allow the state to elect to prosectue for either the attempt or the completed crime.

*[Assault: Where the battery is completed, the state usually prosecutes for "assault and battery."]

C. Beyond preparation to the "attempt range"
The attempt must have gone beyond mere preparation. Three general guides are used frequently:

1. If the act alone would be sufficient evidence to prove the necessary intention, the attempt probably went beyond preparation, and into the "attempt range."

2. If the defendant had completed the last act required of him and the result would have occurred in the normal course of events, the attempt probably had gone beyond preparation, and into the "attempt range."

3. If the act had come dangerously close to completion and the occurrence of the criminal result were highly probable, the attempt probably had gone beyond preparation, and into the "attempt range."

*[Assault: The same principles as for attempts in general; no modification]

D. Adequacy of the means
Several different tests have been used:

1. The means must in fact have been adequate.

2. The means must have appeared adequate to the defendant in light of facts he had believed to be true.

3. The means must have been reasonably adequate.

*[Assault: The three above tests have been used and some courts have employed a fourth test: the victim reasonably had believed that the means was adequate.]

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One of the initiation pranks of a fraternity was a mock electrocution of a pledge. The usual procedure was to strap a pledge in the "electric chair" and give him a very mild shock. One member of the fraternity, Alex, thoroughly disliked the pledge, Jack, who was to be "electrocuted," and so rigged the chair to produce a shock strong enough to knock a person unconscious. Jack didn't attend the initiation because he was ill. Another pledge, Peter, was then scheduled to be "electrocuted." Alex didn't know that Peter had been substituted for Jack because Peter's face was covered with a black hood. He strapped Peter into the chair and pulled the switch. Peter was not shocked because a fuse had blown out. Another member of the fraternity replaced the fuse and noticed the electrical equipment designed to increase the voltage. Peter was released. Would Alex be criminally responsible for assault upon Peter? Discuss.

The first essential element of an assault is that the result, if completed, would have constituted a battery. The electric shock, of course, would have been an injury to the person of Peter. However, the defendant could argue that Peter had consented to the act by submitting to the initiation and therefore the act would not have constituted a battery. This argument would be refuted because Peter's consent would have extended only to the injuries normally associated with such initiations. A violent shock would be beyond these limits of consent. Thus the first element is satisfied.

An attempt to cause a bodily injury implies intention. The defendant could argue that he had intended to injure Jack, not Peter. This argument would not succeed. The defendant had strapped that person (Peter) into the chair and had pulled the switch in order to cause a shock to that person (Peter). Mistake of identity is immaterial and not a defense.

The second essential element (the attempt must have been unsuccessful) and the third essential element (the act must have gone beyond preparation) are obviously satisfied and don't require discussion.

The fourth essential element of assault deals with adequacy of the means. Several tests have been used:

1. The means must in fact have been adequate.
2. The means must have appeared adequate to the defendant in light of facts he had believed to be true.
3. The means must have been reasonably adequate.
4. The victim reasonably had believed that the means was adequate.

The first test would not be satisfied because the fuse had blown. The fourth test would not be satisfied because Peter would reasonably have believed that he would receive only a mild shock. The second and third tests are the tests used most frequently. Both would be satisfied for the defendant hadn't known the fuse was blown.

All essential elements are satisfied and the defendant could be guilty of assault.

Allison saw Baker's image in a mirror in Baker's home. Allison mistook the image for Baker and shot a lead slug through the window with a slingshot. The slug shattered the mirror. Allison claimed that he had intended to frighten the victim, but not to hit him. Could Allison be guilty of assault? Could Allison be guilty of attempted homicide? Discuss.

Assault: The first essential element of an assault is that the attempted result, if completed, would have constituted a battery. If the defendant could convince the court that he had attempted only to frighten the victim, the attempted result would not have involved injury to the person and not have been a battery. However, some courts have held that causing mere apprehension of bodily harm is sufficient. In these courts the first element would be satisfied.

Some courts require that the defendant must have intended to cause a battery (injury to the person). This the defendant denied. However, some courts hold an intention to cause apprehension is sufficient. In these courts, the intention would be satisfied for the defendant admitted that he had intended to frighten Baker.

The second element (attempt must have been unsuccessful), the third element (act must have gone beyond preparation), and the fourth element (means must have been adequate) are all obviously satisfied and need no discussion.

The defendant's criminal responsibility for assault would depend upon whether courts applied the usual rules or the "exceptions" to the first essential element.

Attempted murder: The first essential element for attempted murder is that the attempted result, if completed, would have constituted a murder. The event could hardly have resulted in murder because the defendant had mistaken a mirror image for the victim. Where the defendant had been mistaken about some fact, some courts take the facts as the defendant believed them to be (the object was the victim, not his image). In such courts this element would be satisfied. In other courts the facts are taken as they actually were (the object was only an image). In such courts the element would not be satisfied.

An "attempt" implies that the defendant must have intended to kill the victim. The defendant stated that he had intended merely to frighten the victim, not to kill him. The facts of the case do not support an intention to kill, for a slingshot would be a most unlikely instrument. The defendant could probably convince the court that he had not intended to kill the victim, and the necessary intention would not be satisfied.

The second element (attempt must have been unsuccessful), the third element (act must have gone beyond preparation), and the fourth element (means must have been adequate) would obviously be satisfied and require no discussion.

The defendant probably would not be guilty of attempted murder because the state probably could not prove intent to kill.

PARTICULAR CRIMES

III. Homicides

A. Essential elements

The first essential element of a criminal homicide is the death of a human being. The criminal result which distinguishes battery is injury to the person of another. The criminal result which distinguishes criminal homicide is the ______________ of a ____________ ____________.

death

human being

If Able shot Black with intent to kill him, but the bullet had caused only a slight flesh wound, Able might be guilty of battery and attempted murder, but not of criminal homicide, because the essential element of ________________ of a human being is not satisfied.

death

The death must be of a human being. If an abortionist were charged with homicide for having caused the death of a fetus, the issue would be whether or not ________________________

____

the fetus would be classified as a human being for purposes of criminal homicide.

The general rule is that a child will be considered a human being for purposes of criminal homicide only if the child had been

1. completely expelled from the mother; and
2. alive; and
3. capable of an independent existence.

Suppose a child had been born alive but had died before the umbilical cord was cut. What would the issue be?____________

____

____

whether or not the umbilical cord must have been cut in order for the child to be considered completely expelled from the mother. [Note: The general rule is that the child is considered to have been completely expelled even though the umbilical cord was not cut.]

Suppose the child had been born, the cord cut, and the doctor had been holding her ready to cause breathing by spanking, when he dropped the child and she died. What would the issue be?

____

____

whether or not the child must have breathed in order to be considered to have been alive.

[Note: The general rule is that breathing is not necessary.]

Suppose an abortionist removed a live fetus from the womb and it died almost immediately. What would the issue be?________

____

whether or not the fetus could have existed independently. [Note: Evidence of such ability is an independent circulation.]

Suppose that Jackson maliciously kicked a woman who was in the last month of pregnancy. The blow caused the baby to be born two weeks early and he died 24 hours after birth. Jackson argued that he couldn't be charged with the death of a human being because the blow had occurred before birth. Answer him:___________

____

____

His argument is immaterial because the baby had been completely expelled and had been alive and capable of an independent existence--had lived, in fact, independently for 24 hours.

[Note: This view, though consistent with the previous test, is not universal. Some states require that the injury which caused death have occurred after birth.]

Once a child has been completely expelled and is alive and capable of an independent existence, he is considered to be a human being for purposes of criminal homicide until he actually dies. Thus, a mercy killing of a person in the last stages of a terminal disease could not be justified on the basis that for all practical purposes he was a dead man.

Obviously the essential element of death of a human being implies a "killing," which in turn implies that the voluntary conduct must have been the proximate cause of death. You studied the general principles of causation in the first chapter. Since the examples you analyzed in that section [pages GP 7 through GP 27] were homicide cases, a quick review of the principles should be sufficient.

In order to kill the pilot, Jones drained half the gas out of a private plane so that it would crash over the mountains. While flying above the mountains the pilot choked on a piece of gum he was chewing and he died. Could Jones be criminally responsible for the pilot's death?______ Explain:__________________

____

____

No. The act of the defendant must have been a proximate cause of the death, and in this case Jones' act had nothing to do with the fact that the pilot had choked to death.

Suppose that the pilot had not had trouble with his gum. Instead he was able to make a crash landing when the plane had run out of gas, but the pilot's leg was broken in the landing. Due to his weakened condition from a previous long illness, he died from shock. Assuming that the pilot would have survived if he had not been weak, could Jones be criminally responsible for the pilot's death?______ Explain:____________________________

____

____

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Yes. The defendant's act must have been a proximate cause of the death. The test is whether the act had played an appreciable and substantial part in the death. Where the defendant's act alone would not have caused death, it nevertheless had played an appreciable and substantial part if the other causes acting alone would not have caused death. The weakened condition of the pilot alone would not have caused death. Thus, Jones' act was a proximate cause of the pilot's death.

The mechanic who serviced the plane heard that it had crashed with empty tanks. He assumed that he had not filled the tanks and that the crash had been his fault. He told his wife, who assumed that he would be fired, and she died of a heart attack. Jones would not be criminally responsible for her death because ____

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____

____

where the death was caused by an intervening force, the defendant's act had not played an appreciable and substantial part and thus was not a proximate cause unless (1) the defendant's act had set the intervening force in motion and (2) death was a risk associated with the intervening force. Jones' act hadn't set in motion the mechanic's conversation with his wife, and her death was obviously not an associated risk.

Suppose that when the plane ran out of gas the pilot jumped out of the plane. His chute failed to open and he was killed as he hit the ground. The plane drifted to a safe landing. Jones claimed that since the pilot had jumped, Jones' act of draining the gas had not been a proximate cause of the pilot's death. Answer his argument: ____

____

____

____

Jones' act is still a proximate cause if it had set the intervening force in motion and death was an associated risk. Here, removing the gasoline had set the circumstances in motion which had caused the pilot to jump, and death was an associated risk.

Suppose the pilot had survived the crash but was terribly disfigured. As a result his wife divorced him, he was fired, and he couldn't get another job. Finally, after two years of fighting a losing battle, he committed suicide. Could Jones be criminally responsible for his death?_______ Explain:______________________

____

____

No. If death does not occur within one year of the defendant's act the courts irrebuttably presume that the defendant's act was not a proximate cause.

Of course the act of killing must have been accompanied by a mental element. The degrees of homicide (murder in the first, second, or third degree or manslaughter) are determined in part by which mental element (intention, recklessness, or criminal negligence) is required. Generally, murder in the first degree requires intention. Murder in the second degree may be satisfied by recklessness. Manslaughter may be satisfied by criminal negligence. Murder in the third degree is a special case.

Your purpose in this section will be twofold:

1. to learn how the principles of intention, recklessness, and criminal negligence are applied to criminal homicides, and

2. to become familiar with the degrees of criminal homicides.

Although statutory definitions in various states are not identical, definitions of murder in the first degree usually are construed to require intent to cause death. Recklessness or criminal negligence will not do.

A husband heavily insured his wife and put a time bomb in the airplane when she flew to visit her parents. Everyone in the plane was killed. On a charge of murder in the first degree of the passengers and crew, the husband argued that he had intended only to kill his wife and therefore he could not be guilty of murder in the first degree of the others. Answer him:___________

____

____

____

He had foreseen with substantial certainty that his acts would cause the death of the passengers and crew, and so satisfy the requirement of intention.

A hunter who knew other hunters were in the vicinity, but saw none in his line of fire, shot at a deer, missed, and killed a fellow hunter. Although his conduct may have been reckless or criminally negligent, he could not be guilty of murder in the first degree because ______________________________

____

____

____

murder in the first degree requires intention. Recklessness or criminal negligence will not suffice. Here, the hunter hadn't shot in order to kill another hunter, nor had he foreseen the death as a substantially certain result.

Statutes defining murder in the first degree usually require an intention to cause death or an intention to commit specified felonies. (An intention to cause serious bodily harm usually is not sufficient.) Consider this definition:

> The unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed or any human being, or when committed in the perpetration of or in the attempt to perpetrate any arson, rape, robbery, burglary, abominable and detestable crime against nature or kidnaping, shall be murder in the first degree, and shall be punishable by death.

Cook slapped Hawkins' face. Hawkins slipped, fell, and died from a brain concussion. Could Cook be guilty of murder in the first degree?_______ Explain:____

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No. Murder in the first degree requires (1) an intention to cause death or (2) the commission of or attempt to commit a specified felony. In this case, Cook's act had not been done in order to cause death, nor had he foreseen death as a substantially certain result. Further, the defendant hadn't committed or attempted to commit one of the felonies specified in the statute defining murder in the first degree.

A killer stopped a pedestrian, stuck a gun in his stomach, and said, "Hand over your wallet." The pedestrian refused. The killer knocked him unconscious with the butt of his gun, and took the wallet. The victim died of a brain concussion. Could the killer be guilty of murder in the first degree?_______

Explain:____

____

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Yes. The defendant had intended to commit robbery, one of the felonies specified in the statute.

[Note: The basis of such cases is "transferred intent."]

Suppose just after the killer had hit the victim a police car came by and the killer had fled without the wallet. Again the victim had died of a concussion. Would the killer be guilty of murder in the first degree?_______ Explain:____________________

____

____

Yes. The statute refers to the commission or attempt to commit a specified felony. Failure to complete the felony attempted is immaterial.

Black planned to kidnap White for ransom. One night he climbed into White's bedroom through the window. He heard someone open the bedroom door, so he hid behind a screen. White's wife came in with a knife in her hand. She leaned over White and apparently was going to kill him. Black jumped from behind the screen, grabbed her and yelled, "Watch out! She has a knife and is after you!" They wrestled on the bed and the knife pierced White's heart, killing him. Could Black be guilty of murder in the first degree?______ Explain:________________________________

____

____

____

____

No. For the felony-murder rule portion of the statute to apply, the death must have resulted from an act done in "furtherance" of the felony. Here, the act which caused the death had not been done in furthering the kidnaping, but rather in an attempt to save White's life.

Definitions of murder in the first degree usually require that the person's intent to kill must have been maintained over some slight period of time as opposed to a spontaneous action. Although statutory definitions in various states are not identical, this requirement is frequently expressed in terms such as "premeditation," "deliberation," "malice aforethought." According to the quoted statute, a person could intentionally kill his victim but not be guilty of murder in the first degree if the killing were not ______________________________.

premeditated

So you see, murder in the first degree requires intention plus premeditation. However, courts generally consider that the slightest instant of time is sufficient for premeditation--merely the time required to act purposefully. Therefore, in most cases, facts which would satisfy "intention" would also satisfy "premeditation."

Suppose that John and Joe were engaged in a friendly "scuffle." John was getting the worst of it. His pride was hurt and he became angry. During an exchange of blows John decided to kill Joe, so instead of hitting with his fist, he used a karate blow. Joe died of a concussion. Would John be guilty of murder in the first degree even though he had not begun the fight with "premeditation" of death?______ Explain:________________________

____

____

____

Yes. Murder in the first degree requires premeditation. The killing had been "premeditated" because even though the defendant had decided to kill just before he struck the fatal blow, the slightest time is sufficient for premeditation--merely the time required to act purposefully.

The usual problem then is not whether sufficient time had elapsed for premeditation, but whether the premeditation was negated by passion. If a defendant killed in "passion" or "hot blood" the courts consider that the killing had not been premeditated, and therefore was not murder in the first degree. Where premeditation is negated by "passion" or "hot blood" the defendant may be guilty of murder in the second degree or manslaughter. These concepts will be discussed later.

Suppose during an argument over a debt the creditor yelled at the debtor, "You stupid clod! Your wife and I have been seeing each other for months behind your back. If you don't pay me that money, I'll spread the story all over town!" In a fit of rage the debtor shot and intentionally killed the victim. Even though the debtor had intended to kill the creditor, he would not be guilty of murder in the first degree if ______________________________

____

the rage had amounted to sufficient passion to have negated premeditation.

The concept of "passion" or "hot blood" implies uncontrollable excitement. The person's acts may have been voluntary, and he may have intended to kill, but if he had been provoked into uncontrollable excitement, the killing is not considered to have been premeditated.

Suppose a person shot and killed Parker's son. Parker was so enraged that he jumped on the killer and choked him to death. Although Parker's act was voluntary and although he had intended to kill, the killing was not premeditated if he had been provoked to ________________________________ excitement.

uncontrollable

Suppose Peter accused Jack of being a thief and a blackmailer and threatened to expose him to his employer. Jack killed Peter the following day before Peter had had a chance to expose him. What should the charge be?____________________

Why?____________________

murder in the first degree

Jack was not uncontrollably excited at the time of the killing. He had not acted in passion, and thus the killing had been intentional and premeditated.

Suppose that Darby, by some unlawful act, had caused Lewis to respond with force. Lewis' response had caused Darby to fly into a fit of passion. Courts will not hold that Darby's passion had negated premeditation because his initial act had been ______________________.

unlawful

If a person had not killed in a fit of passion, or if his initial acts had been unlawful, premeditation is not negated and the person may be guilty of murder in the first degree. But now suppose that the person had been provoked into a fit of passion, but a reasonable man in his place would not have been so provoked. The courts have resolved this problem as follows.

If the person had killed in hot blood or passion, but the provocation had not been reasonable (a reasonable man would not have experienced such passion), some courts hold the person guilty of murder in the first degree. Other courts reduce the crime to murder in the second degree. If the person had killed in passion and the provocation had been reasonable (a reasonable man also would have experienced such passion), the crime is reduced to manslaughter.

Suppose Green saw Brown attempting to seduce Green's wife at a party. Green became uncontrollably excited and killed Brown. The crime may be reduced to manslaughter if ______________________

____

____

Green had been in a state of passion and a reasonable man in his place would have been provoked into a state of passion--reasonable provocation.

If Green had been provoked into a state of passion, but a reasonable man in his place would not have been so provoked (the provocation had not been reasonable), some courts would hold ____

____

while other courts would ______________________________

____

the defendant guilty of murder in the first degree. . . reduce the crime to murder in the second degree.

Whether or not the provocation was reasonable may be a difficult question. The judgment depends upon evaluating all the pertinent facts of the case. One fact particularly pertinent to this question is "cooling time."

Suppose that when Green had caught Brown attempting to seduce his wife, Brown had fled to escape a beating. After leaving the party Green and his wife stopped in a bar for a drink, and saw Brown there at the bar. Green became uncontrollably excited and killed Brown. Discuss the possibility of Green's being guilty of murder in the first degree, second degree, or manslaughter.

Murder in the first degree: If, due to the cooling time, the provocation had not been reasonable, some courts would hold the defendant guilty of murder in the first degree.

Murder in the second degree: If, due to the cooling time, the provocation had not been reasonable, some courts would reduce the crime to murder in the second degree.

Manslaughter: If the defendant had acted in passion and the provocation had been reasonable in spite of the "cooling time," the crime would be reduced to manslaughter.

Thus, murder in the first degree may be reduced to murder in the second degree or manslaughter by the negation of premeditation. Now you are ready to consider murder in the second degree:

> The unlawful death of a human being when perpetrated by any act imminently dangerous to another, and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual, it shall be murder in the second degree, and shall be punished by imprisonment in the state prison for life, or for any number of years not less than twenty years.

The definition may be satisfied by conduct imminently dangerous and evincing a depraved mind regardless of human life. Such conduct implies that the defendant had foreseen that his conduct would probably result in death. Such conduct could satisfy part of the definition of a concept we have called

________________________.

recklessness

Murder in the second degree may be satisfied by conduct imminently dangerous to another evincing a depraved mind regardless of human life--recklessness.

Suppose Hill drove his car at 70 mph on a crowded street and hit and killed a pedestrian. He might be guilty of murder in the second degree if the court decided that ________________

____

____

____

____

the defendant had foreseen death to a pedestrian as a probable or possible result of his conduct and his acts were unreasonable. Having driven under these circumstances was an act imminently dangerous to others and evincing a depraved mind regardless of human life.

Paul, a professional football player, was in competition with another player for a place on the team. Paul saw his competitor crossing the street and ran him down hoping to break his legs and eliminate him from competition. The competitor died of a concussion. Could Paul be guilty of murder in the first degree?_______ Explain ____

____

____

____

____

No. He had run down his competitor in order to injure him, not to kill him, and he had not foreseen death as a substantially certain result. Therefore, he had not intended death. Intent to cause serious bodily harm is not sufficient for murder in the first degree.

Would the defendant be guilty of murder in the second degree?_______ Explain:____

____

____

____

____

Yes. Although he had intended only serious bodily injury (not death), he obviously would have foreseen death as a possible result and so his conduct was unreasonable (reckless). His conduct had been imminently dangerous to others, evincing a depraved mind regardless of human life.

Now consider this definition of murder in the third degree:

> The unlawful death of a human being when perpetrated without any design to effect death by a person engaged in the commission of any felony, other than arson, rape, robbery, burglary, the abominable and detestable crime against nature, and shall be punished by imprisonment in the state prison not exceeding twenty years.

Notice that this definition limits cases of murder in the third degree to those involving transferred intent (the felony-murder rule), and applies only to the less serious felonies. This is an example of the general rule you learned previously--that intent should not be transferred to an unintended crime which is much more serious or culpable than the intended crime.

Many states provide for only two degrees of murder and usually cases which would constitute third degree under this statute would be second degree in such states.

Manslaughter is the least serious form of criminal homicide. In many states manslaughter is divided into voluntary and involuntary manslaughter. You recall that statutes defining murder in the first degree are usually expressed in terms such as "premeditation" or "malice aforethought." Where the defendant intended to cause death but without "premeditation" or "malice aforethought," murder in the first degree is reduced to voluntary manslaughter. The usual circumstances which negate "premeditation" or "malice aforethought" are intentional killing in passion or hot blood caused by reasonable provocation. You have just finished analyzing this type of case.

HO 36

Involuntary manslaughter results from situations in which death was not intended. The mental element of involuntary manslaughter may be satisfied by either transferred intent or criminal negligence. First consider criminal negligence.

On a camping trip Lawson's boy was bitten by a rattlesnake. Lawson cut the wound with his dirty hunting knife and sucked out as much poison as he could. The wound subsequently became infected and the boy died. The state charged Lawson with manslaughter based upon criminal negligence. Do the facts satisfy the components of criminal negligence?______ Explain:______________________________

No. The components of criminal negligence are:

1. The defendant must have been under a legal duty to conduct himself in a reasonable fashion. Assumed.

2. A reasonable man would have foreseen that his voluntary act possibly or probably would cause the criminal result, in light of circumstances a reasonable man would have believed to be true. A reasonable man, knowing the knife to be dirty, would have foreseen the possibility of infection and death.

3. The defendant must have acted in an unreasonable fashion, considering the balance of potential benefit v. risk of harm, in light of circumstances a reasonable man would have believed to be true. A reasonable man could have considered the boy more likely to die if he didn't cut the wound than not. Therefore, the act was not unreasonable.

The components of criminal negligence are not satisfied because the defendant's act was not unreasonable.

Abbott had not had the brakes on his car or trailer checked in a year. He took his family on a trailer trip in the mountains. He was driving down the mountain at the maximum recommended speed in order to get to a camping site before dark. The brakes failed to hold, the car and trailer crashed into a boulder, and his wife was killed. He was charged with manslaughter. Do the facts satisfy the components of criminal negligence?_______

Explain:____

HO 40

Suppose in this case Abbott was charged with murder in the second degree. Would the facts satisfy the components of recklessness--an act imminently dangerous to another, and evincing a depraved mind regardless of human life?______ Explain:__________

No. The components of recklessness are:

1. The defendant must have been under a legal duty to conduct himself in a reasonable fashion. Assumed.

2. The defendant himself must actually have foreseen that his voluntary act possibly or probably would cause the criminal result, in light of circumstances the defendant believed to be true. The defendant hadn't actually known that his brakes were marginal and he hadn't foreseen death.

3. The defendant must have acted in an unreasonable fashion, considering the balance of potential benefit v. the risk of harm, in light of circumstances the defendant believed to be true. Going at just the maximum recommended speed, but not knowing that the brakes were marginal, the risk of death was insignificant and so not unreasonable.

Thus, the components of recklessness are not satisfied because the defendant hadn't foreseen death as probable and his conduct had not been unreasonable.

Remember that criminal negligence implies a "greater degree of negligence" than "ordinary negligence" which is sufficient for liability in tort. You also recall that the higher the degree of duty and the wider the margin by which the person failed to conform to reasonable conduct, the greater the degree of negligence and the more likely the courts would be to consider his conduct to be criminal negligence, sufficient for manslaughter. As the duty and margin decrease the more likely the courts would be to consider his conduct to be merely ordinary negligence--sufficient only for torts--or no negligence at all--an accident.

Suppose Rose was driving at a speed less than the speed limit, but somewhat faster than a reasonable man would have driven because the street was congested. He hit and killed a pedestrian. He was charged with manslaughter. The fact that he might conceivably have been sufficiently negligent to support a suit in torts for damages is immaterial because ______________________________

____

____

manslaughter requires criminal negligence which is negligence of a greater degree than that sufficient for torts.

Discuss the factors which would bear upon the question of criminal negligence.

The two most important factors are the degree of duty and the margin by which the defendant failed to conform to reasonable conduct. The duty of a driver to drive carefully to avoid injuring pedestrians on a crowded street would be quite high. However, since the defendant drove slower than the speed limit, the margin by which he failed to conform to reasonable conduct would probably be rather small and so quite probably he would not be criminally negligent.

You recall that involuntary manslaughter was characterized by the fact that the death was not intended. However, involuntary manslaughter may be based upon intent to commit a different unlawful act by use of the concept of transferred intent. Remember that transferred intent applies to first & third degree murder as follows:

The unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed or any human being, or when committed in the perpetration of or in the attempt to perpetrate any arson, rape, robbery, burglary, abominable and detestable crime against nature or kidnaping, shall be murder in the first degree, and shall be punishable by death.

The unlawful death of a human being when perpetrated without any design to effect death by a person engaged in the commission of any felony, other than arson, rape, robbery, burglary, the abominable and detestable crime against nature, or kidnaping, it shall be murder in the third degree, and shall be punished by imprisonment in the state prison not exceeding twenty years.'

When perpetrated without any design to effect death by a person engaged in the commission of an unlawful act not amounting to a felony, it shall be involuntary manslaughter.

If the intended result were less than a felony, but were unlawful (misdemeanor, breaking of an ordinance, etc.), the resulting death could be involuntary manslaughter.

A shoplifter took an article from a store counter. A clerk grabbed his arm and said, "Put that back or pay for it." The shoplifter jerked his arm away, causing the clerk to slip, fall, and die of a concussion. Grand larceny ($100 or more value) is a felony. Petty larceny (less than $100) is a misdemeanor.

1. If the article were an expensive diamond bracelet, what homicide should be charged?____________________

   Explain:____________________

2. If the article were a $1.00 rhinestone bracelet, what homicide should be charged?____________________

   Explain:____________________

HO 46

1. Murder in the third degree. By the statute, a death resulting from the commission or attempt to commit a felony (grand larceny) not listed in the statute defining murder in the first degree, may be murder in the third degree.
2. Involuntary manslaughter. A death resulting from an unlawful act less than a felony (here, a misdemeanor) may be involuntary manslaughter.

You recall that the concept of transferred intent is limited. Courts feel that intention should not be transferred from a less serious to a more serious crime, or that intention will not be transferred unless the intended crime were malum-in-se.

Suppose that Roy was driving his car carefully (no criminal negligence) but without his driver's license (an unlawful act). He unintentionally hit and killed a pedestrian. Could he be criminally responsible for involuntary manslaughter on the basis of transferred intent?________ Explain:________________________

____

____

____

____

No. Driving without a driver's license was intentional and unlawful, but the intention should not be transferred so as to make the defendant guilty of involuntary manslaughter because involuntary manslaughter is much more serious and culpable than driving without a license. Driving without a license is not malum-in-se.

Involuntary manslaughter may be based upon criminal negligence or the transfer of an intention to commit a misdemeanor. You recall that transferred intent may be used to "transfer" intention and recklessness, but may not be used to "transfer" criminal negligence. In these cases, intent to commit some misdemeanor (not criminal negligence) is transferred.

SUMMARY OF PARTICULAR CRIMES

III. Homicides

A. Essential elements

1. Death of a human being
   A newborn child is a human being for purposes of homicide if it had been
   a. Completely expelled from the mother
   b. Alive
   c. Capable of an independent existence.
   * Some courts require that the act which caused death have occurred before birth; other courts do not.

2. Unlawful killing (which implies the following)
   a. A voluntary act which was the
   b. Proximate cause of death (all tests for causation apply) and
   c. A mental element (intention, recklessness, or criminal negligence). Varies with the specific degree of homicide:
      1) Murder in the first degree
         a) Intention
            (1) Usual tests for intention
            (2) Transferred intent
            Intent to commit particular felonies may be transferred according to the general principles of transferred intent. Statutes in various states usually designate applicable felonies.
         b) Premeditation ("malice aforethought," "deliberation")
         Premeditation involves intention maintained over some period of time. Since the time required is quite short, usually facts which would support "intention" would also support "premeditation."
            (1) Degree of passion
            The defendant must have acted under the influence of uncontrollable excitement.
            (2) Character of defendant's previous acts
            The defendant's previous acts must not have been unlawful.
         c) Provocation
            (1) Reasonable provocation
            Crime reduced to manslaughter
            (2) Actual, but not reasonable provocation
            Some courts hold defendant to murder in the first degree; others reduce crime to murder in second degree.

(Note: Passion only negates premeditation required for murder in the first degree. Don't confuse with general defenses.)

2) Murder in the second degree
    a) Recklessness
    b) Negation of passion
    Some courts reduce the charge from murder in the first degree to murder in the second degree when premeditation is negated by actual, but not reasonable, provocation.

3) Murder in the third degree

Transferred intent from felonies usually specified by statute. Instates which recognize only two degrees of murder, the principles of murder in the second degree and murder in the third degree are merged.

4) Manslaughter
    a) Voluntary manslaughter - intentional homicide
    Premeditation negated by reasonable provocation
    b) Involuntary manslaughter - unintentional homicide
        (1) Transfer of an intention to commit a misdemeanor
        (2) Criminal negligence

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PARTICULAR CRIMES

III. Homicides
    A. Essential elements
    B. Defenses to homicides

You recall that not all injuries to the person of another are batteries. Similarly, not all homicides are crimes. Justifiable or excusable homicides are terms applied to killings which are not criminal. These will be discussed in terms of defenses.

You recall that privilege is a defense which frequently involves acts by officials necessary for governmental functions. Privilege is a defense to battery (officer handcuffing an escapee), and privilege is also a defense to homicide (executioner pulling the switch of the electric chair). Consent is a defense to battery, but consent is not a defense to homicide. The state does not condone mercy killing.

Suppose a patient in the last stages of a terminal disease pleaded with his doctor to kill him. If the doctor complied and were charged with a homicide, he could not use consent successfully as a defense because____

____

the state does not condone mercy killing and so will not recognize consent given to such a killing.

Consent and privilege don't pose many problems as defenses to homicides. The prominent defenses are self defense, defense of another, and prevention of commission of felonies.

1. Self defense

You have seen cases in which the victim's acts provoked the killer into a state of passion which negated premeditation. Provocation is a defense to murder in the first degree, but is not a complete defense by any means. The killer could be criminally responsible for a lower degree of homicide. If the killer's acts had been such that he had had to kill the victim in order to save himself (self defense), he could be entirely free from criminal responsibility for any homicide.

Suppose Jones attacked Smith. Smith flew into a rage and killed Jones. Whether Smith would have a complete defense to any homicide or only a defense to murder in the first degree would depend upon whether Smith had the advantage of ________ ___________ or was limited to the "defense" of __________________ negating premeditation.

self defense

passion

The basic requirements for self defense are:

the killer must have

a. reasonably believed that he was in danger of
   (1) death, or
   (2) serious bodily injury; and

b. reasonably believed that his act of defense was necessary to protect himself.

Be sure to notice that both of the above requirements must be satisfied and that both require reasonable belief.

Jackson killed Miller who had attacked him with a small club. Jackson admitted that he hadn't believed that Miller could kill him. The state charged him with a criminal homicide. He pleaded self defense. The state argued that in light of his admission, he could not successfully claim self defense. Answer the state's argument:____

____

Self defense is not limited to the defense of one's life, but also applies to defense against serious bodily injury.

If Morgan spat in Bacon's face and Bacon shot and killed Morgan, Bacon could not successfully claim self defense because

____

____

Bacon could not reasonably have believed that he was in danger of even serious bodily injury from Morgan.

Suppose a husband and his wife were dining together. A neighbor burst into their home, spat in the husband's face, and unjustly accused him of promiscuous conduct. The husband struck the neighbor in the heart with a fork, killing him. The husband had not believed that he was in danger of serious bodily injury and therefore could not successfully argue self defense, but the crime might be reduced from murder in the first degree to manslaughter if ____

____

premeditation was negated by passion.

The killing may have been in self defense even though the killer was not in any actual danger if he actually had believed that he was in danger of death or serious bodily injury, and a reasonable man in his place would also have so believed (reasonable belief).

A customer and his butcher were arguing over a piece of meat. The butcher made a wild gesture with a meat cleaver in his hand. The customer knew that the butcher was not attacking him, but used the gesture as an excuse to kill the butcher. A reasonable man in the customer's place could easily have believed that he was in danger of death or serious bodily injury. Do the facts satisfy the concept of "reasonable belief" necessary for self defense?_______ Explain:____________________________________

____

____

No. Reasonable belief means (1) that the killer actually had believed that he was in danger of death or serious bodily injury and (2) that a reasonable man in his place also would have so believed. Here, the killer hadn't believed that he was in danger.

Suppose the customer mistakenly had believed that the butcher was attacking him with the meat cleaver. If he killed the butcher, self defense could be successfully used because ____________________

____

____

(1) the customer actually had believed that he was in danger of death or serious bodily injury and (2) a reasonable man in his place would have so believed (stipulated in the facts).

The usual rules of mistake of fact apply, but the killer's belief of danger of death or serious bodily injury must still have been reasonable in light of the mistake.

Suppose the butcher turned around with a piece of meat in his hand. The customer mistakenly believed that the meat was a cleaver. The atmosphere was friendly and a reasonable man would not have believed that the butcher was going to strike the customer even though the object in his hand were a cleaver. If the customer killed the butcher, he could not successfully argue self defense, because, even in light of his mistake of fact as to the cleaver, a reasonable man in his place would not have believed that he was in danger of death or serious bodily injury.

A person may not kill in self defense unless he reasonably believes that he is in danger of death or serious bodily harm. An illegal arrest would not necessarily be tantamount to serious bodily injury. Therefore, a person may not kill merely to prevent an illegal arrest or to escape after an illegal arrest.

An officer without a warrant or without just cause said to Perkins, "Come with me. You are under arrest." Perkins shot and killed the officer. Even though the arrest was illegal, Perkins can't successfully claim self defense because ______________________

____

____

a mere illegal arrest would not necessarily cause a reasonable man to believe that he was in danger of death or serious bodily harm.

Although a person may not kill to resist an illegal arrest, he may resist with reasonable force. Suppose in the last case the officer, in making the illegal arrest, tried to handcuff Perkins. Perkins in turn tried to handcuff the officer to a tree so that he could safely escape. The officer drew his gun. Perkins hit the officer with a rock intending to kill him. The officer died. The issue is whether Perkins killed merely to avoid an ____________________ _______________ or whether he killed in _____________ _________________.

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illegal arrest

self defense

The first element of self defense is that a person must have reasonably believed that he was in danger of death or serious bodily injury. Second, a person must have reasonably believed that the acts he committed were necessary to defend himself.

Suppose that Robinson's wife attacked him. He reasonably believed that he was in danger of serious bodily injury, but he knew that he could knock his wife unconscious. However, he shot and killed her. Robinson could not successfully argue self defense, in spite of a reasonable belief of serious bodily injury, because ______________________________ he hadn't believed that the shooting was necessary.

Suppose that Robinson had believed that shooting was necessary, but a reasonable man in his place would not have so believed. The defendant could not successfully argue self defense because the killing was not ______________________________ necessary.

reasonably

Suppose that Robinson had not shot his wife, but punched her on the jaw and knocked her unconscious. She died from a concussion. Even though he could not successfully argue self defense when he shot her in the previous case, he could successfully argue self defense in this case if he could prove that punching her was ______________________________ reasonably necessary

(Note: Thus the question is not "was the *killing* reasonably necessary," but "was the particular act the defendant *did*--which resulted in death--reasonably necessary.")

Even though the killer may have reasonably believed that his *initial* acts were necessary, his *total* conduct may have been in excess of what a reasonable man would have believed was necessary.

Suppose an assailant attacked Alley. Alley threw him down, knocked him unconscious, and kept beating the assailant's head against the floor until death occurred. Alley may have reasonably believed that his initial acts were necessary but he could not successfully argue self defense for his total conduct because

____

____

a reasonable man in his place would not have believed that it was necessary to keep beating the assailant after he was unconscious.

A neighbor advanced upon Green with a knife. Green grabbed the neighbor's arm, took the knife away, and stabbed the neighbor through the heart, killing him. Green argued self defense.

Answer him:____

____

After disarming the neighbor a reasonable man would not have believed stabbing was necessary.

If a person could save himself by running away from his assailant, killing to defend himself might not be necessary. Since this is so, does the possibility of retreat preclude self defense? The courts are divided. Some say that if a person were attacked while he was in a place in which he had a right to be, and were not at fault, he could stand and defend himself, even though safe retreat was possible.

Labine's car broke down in the middle of the night. He went into a friend's home, called a cab, and went into the living room to wait for the cab to arrive. The owner was awakened by the phone conversation, came down to investigate, and saw Labine. He thought that Labine was an intruder and jumped him. They struggled. Labine broke the owner's grip and could have retreated but didn't. In the confusion he couldn't make the owner understand that he was a friend. Finally, Labine killed the owner because he reasonably believed that his life was in danger and that killing was necessary. Could Labine successfully plead self defense according to the theory explained?________ Explain:____________________________________

____

____

No. Under this theory Labine would be required to have retreated because he had no right to be where he was. He was at fault--he was trespassing.

Other courts require that the defendant have retreated unless he had reasonably believed that to do so would increase the danger to himself.

Suppose that Jensen was climbing into his car. His assailant ran toward him with a gun yelling, "I'm going to kill you!" Jensen shot and killed the assailant. Apply the first theory: ____________

____

____

____

____

According to the second view, the issue would be __________________

____

____

1. According to the first view, the defendant could successfully argue self defense because he had been attacked, he had a right to be where he was, and he was not at fault, and thus even a safe retreat was not necessary.
2. Whether or not he reasonably had believed an attempt to retreat would increase his danger. If he could have stepped into his car and easily escaped, he should have done so.

If a person becomes involved in a "sudden affray," rather than having been attacked by an assailant who intended to kill or seriously injure him, he must retreat if he can do so safely. Failure to retreat would preclude his plea of self defense. The line between "attack" and involvement in "sudden affray" may be very difficult to draw.

In most of the cases discussed so far, the person pleading self defense was not at fault. Now you must consider cases where he was at fault to some degree. In such cases the issue of self defense will depend upon the degree of fault. If the defendant had attacked his victim in order to provoke a counterattack, and then killed his victim, he may not successfully plead self defense. If the defendant had been the aggressor and his acts were quite violent, he could not successfully plead self defense.

McHenry sneaked behind his neighbor and hit him with a stick, hoping to knock him unconscious, but not in order to provoke a counterattack. The neighbor turned and fought back. McHenry hit the neighbor again and killed him. McHenry could not successfully use self defense because ___________________________

____

he had been the aggressor and his acts had been quite violent.

If the person pleading self defense were at fault, but his total conduct had been so mild that it would not have caused a reasonable man in the victim's place to attack, he may kill in self defense.

Suppose Kelly unlawfully shoved a shopper out of his way at a crowded bargain counter. The shopper drew a gun to shoot him. Kelly knocked the shopper down and he died of a concussion. Kelly could successfully claim self defense even though he was initially at fault because ________________________________

____

his total conduct had been so mild that it would not have caused a reasonable man in the shopper's place to attack.

(Note: Of course, the attack by the victim must have been such that the defendant reasonably believed that he was in danger of death or serious bodily injury and reasonably believed that his act of defense was necessary.)

If the person pleading self defense were at fault to some degree, but he had not been the aggressor, he may have the benefit of self defense.

Suppose a home owner grew tired of an insurance salesman's attempts to sell him a policy and ordered the salesman from his home. The salesman refused to leave. The owner drew a gun and said, "All right, stay, but you'll stay dead!" The salesman hit him and he died of a concussion. The salesman has the benefit of self defense in spite of the fact that his staying after a request to leave was unlawful because ______________________________

____

____

he was not the aggressor, and he reasonably had believed that his life was in danger and that his act was necessary.

If the person's conduct were unlawful but were not the cause of an attack, of course he may use self defense.

Borden bought drinks at the bar with counterfeit money (an unlawful act). The bartender mistook him for another person and attacked him with a knife. Borden hit the bartender who died of a concussion. Borden is entitled to self defense even though his use of counterfeit money was unlawful because ________________

____

his unlawful conduct had not been the cause of the attack.

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SUMMARY OF PARTICULAR CRIMES

III. Homicides
A. Essential elements
B. Defenses to homicides

1. Self defense
   - a. Reasonable belief of death or serious bodily injury
     - 1) The danger need not have been actual
     - 2) Usual rules of mistake of fact apply

   [Note: Remember, reasonable belief means that the defendant believed, and a reasonable man in his place also would have believed.]

   - b. Reasonable belief that his act of defense was necessary
     - 1) Actual necessity is not required
     - 2) Act of defense may have been done with intent to kill or to merely incapacitate
     - 3) Total conduct of the defendant must have been done in the belief of reasonable necessity
     - 4) Effect of possibility of safe retreat
       - a) Defendant attacked by an assailant with intent to kill or cause serious bodily harm (split opinion)
         - (1) Some courts hold that the defendant need not have retreated if he had been in a place where he had the right to be and was not at fault, even though safe retreat was possible.
         - (2) Some courts hold that the defendant must have retreated unless he reasonably believed that to do so would increase the danger.
       - b) Defendant involved in "sudden affray"
         The defendant must have retreated unless he reasonably had believed that to do so would increase the danger.
   - c. Degree of fault
     The defendant must not have been appreciably at fault
     - 1) Unsuccessful self defense
       - a) If the defendant had attacked the victim in order to promote a counterattack
       - b) If the defendant had been the aggressor and his acts had been violent
     - 2) Successful self defense
       - a) If the defendant had been the aggressor but his acts had been so mild that a reasonable man in the victim's

place would not have attacked

b) If the defendant were at fault to some degree but had not been the aggressor

c) If the defendant's conduct were unlawful but had not been the cause of the victim's attack

2. Defense of another

A person may kill to protect himself. He also may kill to protect another from death or serious bodily injury. Of course, the person pleading defense of another must

1. reasonably have believed that the person he defended was in danger of death or serious bodily injury and
2. have reasonably believed that his total act of defense was necessary.

These elements are similar to those in self defense and the same principles apply. Courts generally agree on these principles. However, courts disagree on the principles of the third element:

3. Some courts require that the person pleading defense of another reasonably have believed that the person he defended was not at fault.

   Other courts require that the person defended actually not have been at fault.

Gray saw Able pull a knife on Baker. Baker grabbed Able's hand and was trying to twist the knife out of his grasp. Gray shot and killed Baker and claimed defense of another (Able). Even though Gray might conceivably have believed that Able was in danger and that it was necessary to kill Baker, he could not successfully argue defense of another because ________________________________

____

Gray had known at the time of the event that Able was at fault.

Suppose that Lee saw Boyer and Smith fighting. Lee assumed that Boyer was a police officer attempting to arrest Smith, because Boyer was wearing a police uniform. Actually, Boyer was using the uniform as a ruse to assist in robbing victims such as Smith. Lee killed Smith in reasonable belief that Boyer's life was in danger and the killing was necessary. Lee argued defense of another. Apply both views:_______________

According to the first view, the defendant could successfully argue defense of another for he reasonably had believed that Boyer was not at fault.

According to the second view, the defendant could not successfully argue defense of another because Boyer actually had been at fault.

SUMMARY OF PARTICULAR CRIMES

III. Homicides
  A. Essential elements
  B. Defenses to homicides
    1. Self defense

2. Defense of another

  a. Reasonable belief that the person defended was in danger of death or serious bodily injury. [All principles of self defense apply.]

  b. Reasonable belief that the defendant's act of defense was necessary. [All principles of self defense apply.]

  c. Innocence of the third party [Split opinion]
    1) Some courts require that the third party actually must not have been at fault.
    2) Some courts require that the defendant have reasonably believed that the third party was not at fault.

3. Prevention of commission of an offense

You have just seen that killing to prevent death or serious bodily injury to one's self or others may be lawful. Similarly, a person may kill to prevent the commission of felonies attempted by force or violence. Usually a defendant may not kill to prevent commission of misdemeanors.

Suppose that Perkins killed Jenkins whom he knew was kidnaping Smith. The killing could not be justified on the basis of defense of the life of another, but could be justified on the basis of ____

____

prevention of a felony involving violence.

Allen saw a thief taking an expensive ring from a display in a jewelry store. Many courts would hold that he could not lawfully kill to prevent the grand larceny (a felony) because

____

the felony had not involved violence.

However, suppose that Allen saw an assailant wrestle a woman to the ground in an attempt to take her ring from her finger. The defendant might lawfully kill to prevent the robbery because ____

____

the felony was attempted by force and violence.

Courts have held that killing to prevent arson (burning a habitation) and burglary (breaking and entering a habitation with intent to commit a felony) were lawful, because these felonies involve violence.

Suppose that the wind blew a package out of a shopper's arms onto the porch of the Cone's home. The shopper started up the walk to get it. Cone told the shopper to stop--not to trespass. The shopper walked up the porch steps and Cone hit him, causing death by a concussion. Cone argued "defense of habitation." Answer him:________________________________

____

No defense. The shopper had not been attempting to commit a felony by violence.

Suppose the shopper jumped onto the porch and started choking Cone. Cone hit the shopper causing death by a concussion. Might Cone have a defense?____________ If so, what might it be?____

Yes. Self defense

Where the defense is based upon prevention of a felony the usual requirements apply:

1. The defendant must reasonably have believed that a felony was about to be committed, and
2. The defendant must reasonably have believed that his act was necessary to prevent the commission of the felony.

Similar concepts have been discussed in relation to other defenses. Therefore, only one point will be emphasized. The defense is based upon prevention of a felony about to be committed. The defense would not apply to a killing of a felon after the felony had been __________________________.

committed (or completed)

(Note: Right to arrest a felon and overcome his resistance to arrest after he had completed the felony will be summarized in the next section.)

SUMMARY OF PARTICULAR CRIMES

III. Homicides
- A. Essential elements
- B. Defenses to homicide
  - 1. Self defense
  - 2. Defense of another

3. Prevention of felonies

- a. Reasonable belief that felony is about to be committed (Does not apply to misdemeanors)

- b. Reasonable belief that the act was necessary to prevent the commission of a felony

- c. Felony must have been attempted by force or violence

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SUMMARY OF PARTICULAR CRIMES

III. Homicides
  A. Essential elements
  B. Defenses to homicide
    1. Self defense
    2. Defense of another
    3. Prevention of felonies

4. Arrests

Since the law of arrest is covered in detail more appropriately in Criminal Procedure, only the points relative to defenses are presented here in condensed form.

Under some circumstances a police officer may kill in order to arrest the victim. Such killing would be justified only if:

a. The officer had the authority to arrest and arrest was legally made. Assumed in all cases in this text.

b. Killing was reasonably necessary
The officer could not use more force than necessary to overcome resistance to arrest. Note that the defense is not based upon self defense, but upon overcoming resistance to arrest; therefore, the elements of self defense need not be satisfied.

c. Felony actually committed
The killing is not lawful unless the arrest was based upon the actual commission of a felony. Reasonable belief by the officer that the arrestee committed a felony is not sufficient.

(Note: An officer may not kill to effect an arrest where only a misdemeanor is involved. Of course, if the arrestee attacked the officer, the officer may kill in self defense--rather thanthe right to kill to arrest for a misdemeanor--and all the elements of self defense must be satisfied.)

Wilson and his son went on a hunting trip with a group. One member of the group, Abbott, a notorious joker, tried to frighten the son by firing a bullet close to his feet. The bullet hit the son in the leg. Wilson knew that Abbott would never intentionally hurt his son, but nevertheless, Wilson was furious and fired at Abbott, intending to kill him. The bullet missed Abbott and wounded another hunter, Victor, near the heart. One of the hunters was a doctor. He decided that the bullet had to come out immediately in spite of adverse operating conditions. Victor agreed. The doctor removed the bullet but Victor died soon afterwards from infection. Would Wilson be criminally responsible for Victor's death? If so, to what degree?

The essential elements of criminal homicides are death of a human being and an unlawful killing. The first essential element--death of a human being--is obviously satisfied and needs no discussion. The second element--an unlawful killing--implies voluntary conduct (obviously satisfied) which was the proximate cause of death. The test is whether or not the defendant's acts had played an appreciable or substantial part in the death. Where the result was caused by an intervening force, the defendant's act played an appreciable and substantial part if it

1. had set the intervening force in motion and
2. if the occurrence of the result was a risk associated with the intervening force.

In this case the defendant's act had made the operation under adverse circumstances necessary and, of course, the risk of death is associated with an operation performed under adverse conditions. Thus, the defendant's act was a proximate cause of the death.

Unlawful killing must have been accompanied by a mental element (intention, recklessness, or criminal negligence) which determines the degree of homicide. The defendant could be guilty of first degree murder only if the killing had been intentional. The two tests for intention are:

1. the act had been done in order to cause death, or
2. the defendant had foreseen death as a substantially certain result.

The defendant hadn't shot in order to kill Victor, nor had he foreseen the victim's death as substantially certain. Therefore, the defendant had not intended the death of the victim.

The defendant had shot in order to kill Abbott, however. The doctrine of transferred intent may be used to transfer intent to kill Abbott to intent to kill Victor. The important limitation upon the theory of transferred intent is that the intended result must be _malum-in-se_ or at least as culpable as the actual result. Killing Abbott would be _malum-in-se_ and as culpable as killing Victor.

First degree murder also requires premeditation (malice aforethought, deliberation). The defendant could argue that he had acted in the heat of passion and that premeditation was negated. The considerations for such a negation are:

1. The defendant must have acted under the influence of uncontrollable excitement. This he claimed. Assume that he proved it.

2. Character of the defendant's previous acts. The defendant had not engaged in previous unlawful conduct which would have caused Abbott to fire at his boy.

3. Provocation. If the defendant had killed in passion and a reasonable man also would have been provoked to such passion, the crime is reduced to manslaughter. If the defendant had acted in passion, but a reasonable man would not have been so provoked, some courts hold the defendant to first degree; other courts reduce the crime to murder in the second degree.

The central issue is the question of fact as to whether a reasonable man would have been provoked to such passion.

(Note to the student: At this stage of the analysis most instructors would give equal credit for either alternative that was well argued. For example, one answer could be:

A reasonable man would probably have been provoked into such passion because such "jokes" can result in death or serious injury and are taboo in any responsible group. A reasonable man would easily have thought that his boy was in danger of death and have acted under the influence of "uncontrollable excitement." The crime should be reduced to manslaughter.

Another possible answer could be:

A reasonable man would have been primarily concerned with the condition of his son. He would have seen that his son was hit in the leg, and thus not in immediate serious danger of death. Of course, a reasonable man would have been angry, but probably he would not have been provoked to "uncontrollable excitement." The charge should be first or second degree homicide depending upon the state.)

Thus, the defendant could be guilty of murder in the first degree, second degree, or manslaughter, depending upon how the question of premeditation was resolved.

(Note to the student: The questions were "Would the defendant be criminally responsible for homicide? If so, to what degree?" These questions were answered. Suppose the question had been "Discuss fully" or some other very general question. In such a case you should consider all crimes that the facts bring into issue. Don't waste time discussing crimes which are not in issue. Obviously, you wouldn't discuss burglary because the facts don't concern any of the elements of burglary.

However, the facts do concern Abbott's intent to cause the son apprehension and injury. Thus, assault and battery are in issue.

The defendant fired at Abbott, intending to kill him. Thus, attempted murder is in issue.

The doctor performed acts which resulted in death by infection although he had foreseen the possibility. These facts bring up the issue of the doctor's criminal responsibility for homicide. This should be discussed even though you might ultimately find no criminal responsibility.

You see, the all-important factor is your analysis of the issues:

1. Don't discuss crimes not in issue.

2. Discuss all crimes which are in issue. Don't fail to discuss a crime which is in issue merely because you ultimately decide that the crime wasn't committed. If the facts bring up ambiguities concerning the essential elements of a crime, that crime is in issue even though the crime may not have been committed because the elements weren't satisfied.)

Jones, in the company of his date, drove 55 mph in a 45 mph zone. In the past he had frequently exceeded the speed limit on this road and so he didn't anticipate any difficulty. The car swerved off the road, travelled down a ravine, and crashed into a farmhouse. The farmer was injured by the collision and died a week later. A police officer who had been following Jones attempted to arrest Jones. Jones started to run away and the officer attempted to hold him. Jones tried to grab the officer's gun. The officer said, "Stop that or I'll shoot!" Jones continued his efforts. The officer shot Jones, intending to kill him. Jones lived for six months.

Discuss his criminal responsibility for the death of the farmer. Discuss the officer's criminal responsibility for the subsequent death of Jones.

I. Jones' criminal responsibility for the death of the farmer

The essential elements of criminal homicide are the death of a human being and an unlawful killing. The only issue raised by the facts involves the mental element--intention, recklessness, or criminal negligence. The two tests for intention are:

1. The defendant must have done the voluntary act in order to cause the criminal result; or
2. The defendant himself must actually have foreseen with substantial certainty that his voluntary conduct would cause the criminal result, in light of circumstances the defendant believed to be true.

Obviously, Jones hadn't driven in order to kill the farmer. The facts state that Jones hadn't anticipated an accident, so he hadn't foreseen the death as a substantially certain result. Thus, Jones hadn't intended the death.

The components of recklessness are:

1. The defendant must have been under a legal duty to conduct himself in a reasonable fashion. Assumed.
2. The defendant himself must have actually foreseen that his voluntary act possibly or probably would cause the criminal result in light of circumstances the defendant believed to be true.
3. The defendant must have acted in an unreasonable fashion, considering the balance of potential benefit v. the risk of harm, in light of circumstances the defendant believed to be true.

The facts state that Jones had not anticipated the accident. Therefore Jones himself had not actually foreseen the death of the farmer as a possible or probable result. Thus, Jones had not been reckless in relation to the farmer.

(Note: No need to discuss other components of recklessness in detail.)

The requirements of criminal negligence are:

1. The defendant must have been under a legal duty to conduct himself in a reasonable fashion. Assumed.

2. A reasonable man would have foreseen that his voluntary act possibly or probably would cause the criminal result, in light of circumstances a reasonable man would have believed to be true.

3. The defendant must have acted in an unreasonable fashion, considering the balance of potential benefit v. the risk of harm, in light of circumstances a reasonable man would have believed to be true.

A reasonable man would not have foreseen the death of the farmer as a possible or probable result because the farmer wasn't present.

(Note: Not necessary to discuss other components of criminal negligence in detail.)

The state could argue that Jones had been criminally negligent in relation to his date. The state might then argue that the criminal negligence in relation to the date could be transferred to the farmer. This argument would fail because criminal negligence is not transferred. The theory of transferred intent applies to recklessness, but the state could not prove that Jones was reckless in relation to his date because Jones himself had not actually foreseen the possibility or probability of death. The facts state that he had not anticipated the accident.

The theory of transferred intent does apply to intentional unlawful acts. Jones had intended to speed. The state could argue that the intention to speed could be transferred to intent to kill the farmer. The theory of transferred intent has several limitations. One applies here:

> The theory is not applied unless the intended unlawful act was malum-in-se or at least as culpable as the unintended result. Most courts would probably hold that driving 10 miles over the speed limit on a substantially empty road was not malum-in-se and not as culpable as homicide. Therefore, most courts would not apply the theory of transferred intent in this case.

Jones would not be criminally responsible for the death of the farmer because the facts fail to show that Jones had intended the farmer's death or that he had been reckless or criminally negligent in relation to the farmer's death.

II. Officer's criminal responsibility for death of Jones

Again, the only issue raised involves the mental element. Murder in the first degree requires intention and premeditation. The intention was stipulated. Premeditation requires only the slightest time. The officer's statement, "Stop or I'll shoot!" is evidence of sufficient time for premeditation. All the elements are satisfied. Obviously, the issue is a matter of defense.

The officer would argue that the killing was lawful because it had been done in an attempt to arrest. The essential elements are: Authority to arrest and legality of arrest. Assumed

The killing was reasonably necessary. The officer could use no more force than was reasonably necessary. The killing would not have been reasonably necessary unless force had been directed against the officer. The officer would argue that Jones' attempt to get the gun was force directed against the officer, and that killing had been reasonably necessary.

A felony must actually have been committed. The defendant had not committed a criminal homicide as previously argued, and speeding is not a felony. Thus, no defense of lawful killing to arrest.

The officer could argue self defense. The elements are:

Reasonable belief of death or serious bodily injury. The officer had believed and a reasonable man in his place would have believed that, if Jones had obtained the gun, danger of death or serious bodily injury would result. However, Jones had not yet obtained the gun, and the officer still obviously had control, for he shot Jones. A jury could easily find that while Jones was not attacking the officer with a deadly weapon, but was still trying to get the gun, this requirement is not satisfied. However, assuming injury would decide this issue in the officer's favor, the next requirement must be satisfied.

Reasonable belief that the act (shooting Jones) was necessary. The officer may have believed that the act was necessary, but the jury would probably find that a reasonable man would not agree that shooting with intent to kill was necessary. Incapacitation would probably have been reasonable, but not killing. Thus, this requirement is not satisfied.

Retreat is not in issue.

The officer must not have been appreciably at fault. The initial acts of the officer, arresting for a misdemeanor, were lawful.

Self defense fails because the shooting with intent to kill was not reasonably necessary.

PARTICULAR CRIMES

IV. Larceny and related crimes

A. Larceny

Larceny involves the taking and carrying away of personal property of another with intent to cause permanent unlawful deprivation. Notice that larceny relates only to personal property, not to real property. The first essential element of larceny which you will consider is that the property taken and carried away must have been personal property.

If a defendant were charged with larceny of the house trailer of another, the issue would be whether or not the house trailer is ____________________ ____________________.

personal property

The legal distinction between real and personal property is analyzed in property courses and therefore is not treated in detail here. A discussion of one generalization will be sufficient.

> The term "real property" (realty) usually refers to land and things attached to or associated with land (houses, trees, etc.).
>
> The term "personal property" (personalty) usually refers to articles not closely attached to or associated with land.
>
> The distinguishing feature is the degree of association with the land.

The determination of whether a house trailer would be classified as realty or personalty would depend upon ________________________

____

the degree of association of that particular trailer with the land.

This test of "the degree of association with the land" is applied to the property in its condition at the time the defendant took it.

Suppose a person dug up another's tree and carried it away. The act could not have been larceny because ______________
____

the property taken was not personalty--a tree growing in the ground is realty.

Where the person dug up another's tree, left to get a truck, and then came back and carried the tree away, some courts have held that larceny was committed because at the time the tree was taken and carried away it was no longer closely associated with the land and therefore was ______________________.

personalty

Some courts have distinguished between personalty and mere evidence of personalty, such as a bill or a note or a contract. These courts have held that the taking and carrying away of a note was not larceny because the note was not personalty, but mere evidence of personalty. Most states have statutes prohibiting the taking of such items.

The next essential element of larceny involves intention. Some definitions of larceny require "felonious intent to deprive." The word "felonious" is misleading. A person need not have intended a "felony." The act may be larceny even though he didn't know what a "felony" is, what a "larceny" is, or that his act would constitute larceny. Ignorance of the law is no defense.

A person mistakenly believed that taking personalty worth less than $10.00 is not larceny. He took a package of cigarettes which he knew belonged to another. When charged with larceny, the defendant admitted that he had intended to take the cigarettes, but argued that he hadn't intended to commit a "felony." Answer him: ____

____

Larceny does not require that the defendant must have intended to commit a felony. Ignorance of the law is no defense.

The definition of larceny requires an intention to unlawfully permanently deprive another. The deprivation is unlawful only if

a. the person knew that he had no right to take the personalty, and

b. the person knew that he was depriving a person who had the right of possession.

The person need not have intended to commit a felony, but he must have intended to cause ________________________________

____

permanent unlawful deprivation of another

In order to prove that the defendant had intended unlawful deprivation, the state must prove that ______________________

a. ______________________

b. ______________________

____

the defendant had intended to take the personalty

a. knowing that he had no right to possession, and

b. knowing that another person had the right of possession.

Astor mistakenly thought a book on the desk was his. He took it home. He hadn't intended to cause permanent unlawful deprivation of another because ______________________________

____

____

he had thought that he had the right of possession and hadn't known that another person had a right of possession. Mistake of fact is a defense.

At a poker game both Smith and Jones claimed a stack of poker chips. The chips belonged to Jones. Smith took them in the honest belief that they were his. Smith's act would not be larceny because Smith ____________________________________

____

____

____

had not intended to cause permanent unlawful deprivation. Smith had thought that he had the right of possession and hadn't known that Jones had the right of possession. Mistake of fact is a defense.

Johnson hired a contractor to build a house. A disagreement arose and Johnson considered that the contractor had breached the contract and caused damages. Johnson sold the contractor's power tools believing that he had a right to do so. Johnson's act would not constitute larceny because ________________________

____

____

____

he had not intended to cause permanent unlawful deprivation. Johnson had thought that he had the right of possession of the contractor's tools and hadn't known that the contractor had the right of possession. Mistake of fact is a defense.

A person must have intended to cause permanent unlawful deprivation of another. As you have seen, the person must have known that he had no right to take the personalty and he must have known that another did have the right of possession. However, the definition does not imply that the defendant must have known precisely what person did have the right of possession.

Suppose Hill liked sports coupés, and took the first one that he could find on the street and drove it to Mexico where he planned to remain. Hill's act could be larceny because __________

____

____

Hill had known that he did not have the right of possession and he had known that someone else did, and so he had intended to cause permanent unlawful deprivation.

Hill argued that he should not be guilty of larceny because he hadn't known who owned the car. Answer him:________________

____

Hill's argument is immaterial. Such knowledge is not required.

A few courts have held that a person must have intended to benefit himself (lucri causa). If a person killed another's cow and took it away for food, he would have intended to cause permanent unlawful deprivation of another, and to benefit himself (lucri causa). But if he shot the cow and dumped it into a canal just to cause the other person financial loss, a small minority of the courts would hold that the intention element of larceny would not be satisfied because ________________________________

____

the person hadn't intended any benefit to himself (lucri causa).

The usual definition requires an intention to cause permanent unlawful deprivation. Some courts have held the intention to cause temporary unlawful deprivation is sufficient.

A person unlawfully took his friend's car, intending to use it for a date and return it the next morning. If he were charged with larceny, the issue would be ______________________

____

whether or not temporary unlawful deprivation would suffice.

(Note: In states which require that the defendant must have intended permanent unlawful deprivation, statutes prohibiting "joy riding" are common.)

* In the remainder of this text assume that the person must have intended permanent deprivation.

Remember that intention is required. Recklessness or criminal negligence won't do.

Suppose a person intentionally burned a letter which belonged to another. The act could be larceny. But if the person had not intended to burn the letter, but rather had burned it recklessly or negligently, he could not be guilty of larceny.

Also note that the concept of transferred intent does not apply to larceny. Suppose a person broke into the victim's house to get a letter to read it (not destroy it), and the letter was burned by the person's criminally negligent conduct. The intention to break into the victim's home could not be transferred to an intention to cause unlawful permanent deprivation because

____

the concept of transferred intent does not apply to larceny.

You recall that voluntary drunkenness usually is not a defense, but may be a defense where intention is required and the intoxication renders the person incapable of entertaining the required intent. This principle applies to larceny.

Suppose that Joe and Jim were drinking at a night club. Each had his own bottle. Joe finished his bottle and was very, very drunk. Jim had passed out. Joe wanted more to drink, so he took Jim's bottle and finished it off. If his act of reaching over and getting the victim's bottle had not been voluntary, of course no crime could result. Obviously, the act had been voluntary, but he may have been so drunk that he might not have had the capacity to entertain an intention to unlawfully permanently deprive Jim. Admittedly, this is a fine margin, but Joe would not have been guilty of larceny even though the drunkenness had been voluntary if he were ________________________

____

not capable of entertaining an intention to cause permanent unlawful deprivation.

The next essential element of larceny is that the personalty must have been taken and carried away. Both the "taking" and the "carrying away" are required. "Taking" involves control over the personalty. "Carrying away" involves control over and movement of the personalty.

Suppose a person enticed another's dog out of the yard with a steak. Every time he tried to pick the dog up the dog darted off. The person could not have committed larceny because

____

____

he had not gained sufficient control to have constituted a "taking" of the dog.

A defendant may exercise control over personalty (put his hand on it) but not carry it away. A taking alone is not sufficient. The test for "taking" is control. The test for "carrying away" is control and movement. The slightest degree of movement is sufficient _if_ the defendant had sufficient control to have completed the removal.

Suppose a person opened a drawer containing a package of money wrapped in paper and tied with a cord. He reached into the drawer, held the package, and scratched a hole in the paper with his fingernail so that he could determine whether the money was inside. Could the act have been larceny?______ Explain:_________

____

____

No. The person may have exerted sufficient control for a taking, but the personalty was not carried away because the package had not been moved.

Now he moved the package one inch off the bottom of the drawer, but not out of the drawer. He heard a noise and dropped the package. Could the act have constituted a taking and carrying away?________ Explain:____

____

Yes. The slightest movement is sufficient if the person had had sufficient control to have completed the removal.

Suppose he had not been frightened, and took the package almost out of the drawer. This time the cord used to tie the package caught on a nail in the drawer. He pulled on the cord but couldn't break it loose. He reached into his pocket for a knife to cut the cord, heard a noise, and dropped the package. Could these acts have constituted a taking and carrying away?

________ Explain: ____

____

____

____

____

No. Although he moved the package he did not have sufficient control to remove it as long as the string was caught. The slightest movement is sufficient only if the person had sufficient control to have completed the removal.

The "taking" and "carrying away" of the personalty must constitute a trespass. Further, the definition of larceny requires the intention to cause permanent unlawful deprivation. These concepts merge at this point. The intention to cause unlawful permanent deprivation is necessary for the taking and carrying away to be a trespass. Further, additional requirements must be met. To constitute a trespass, the taking and carrying away of the personalty must have been accomplished under the following conditions:

1. The defendant must have intended to cause permanent unlawful deprivation.
2. The personalty must have been taken from actual or constructive possession of the victim.
3. The victim must have had some right of possession.
4. The victim must not have consented to the defendant's acquisition of possession.

First, consider the requirement of "intention." You have already studied this concept as a separate element. Therefore, the application of the principles of "intention" in the context of the trespass need not be repeated. One short example will be sufficient.

A person found a watch which he knew belonged to another. He took it home intending to keep it. The act could have satisfied the "intention" necessary for a trespass because the person____ had intended to cause permanent unlawful deprivation.

If the person took the watch home intending to return it to the owner, the act would not have satisfied the intention element of a trespass because the person ______________________________

____

had not intended to cause permanent unlawful deprivation.

The second requirement for the trespass is that taking and carrying away must have been from the actual or constructive possession of the victim. In this context, "possession" is a technical term with special connotations which must be analyzed. "Possession" implies that the victim must have a high degree of control over the personalty.

Suppose a stream flowed through the middle of the Jenkins' land. Mallory caught a salmon migrating up the stream. Even though Jenkins had the right to possess the salmon, he had not acquired control over them. Therefore, Mallory's act would not have been a trespass because the taking would not have been from the actual or constructive possession of another. If Jenkins had caught salmon and put them into a pond on his property and Mallory had caught one of these and was charged with larceny, the issue would be ____

____

whether or not Jenkins had exercised sufficient control to have acquired either actual or constructive possession.

Once the victim has acquired control and possession, he does not "lose possession" by merely relinquishing physical possession. In such cases, he no longer has actual possession, but he had retained constructive possession.

Suppose a person slipped into the victim's house and took and carried away money from a drawer. Obviously, the act constituted larceny, even though the taking was not from the victim's actual possession, because the taking was from his ______________________

____________________________.

constructive possession

If Smith delivered his personalty to Jones, Smith, of course, would lose actual possession. He may or may not have retained constructive possession. The determining factor is control. If Smith gave Jones very little control over his personalty, Smith retained constructive possession. If Smith gave Jones a great degree of control, Smith did not retain constructive possession.

Suppose that Smith had lent his book to Jones for overnight. After reading the book, Jones liked it so much that he decided to keep it permanently. The original taking of the book was not a trespass because ______________________________

____

Jones had not intended to cause permanent unlawful deprivation at the time he originally received the book.

When Jones decided to keep the book the act would not be a trespass unless Jones had taken the book from the__________

____

actual or constructive possession of Smith.

Obviously, Smith did not have actual possession, but whether or not he had retained constructive possession would depend upon the degree of control he had given Jones. Jones was given very little control. He was merely allowed to take the book and read it and was required to return it the next day. Therefore, Smith retained constructive possession. Subsequently when Jones took the book home, the act could have been a trespass because he had intended to cause permanent unlawful deprivation and the "taking" was from the _________________________ possession of Smith.

constructive

Suppose Perkins left his watch with a jeweler to be repaired. After the jeweler had repaired the watch, he liked it so much that he took it home with the intention of keeping it permanently. Whether or not taking the watch home would have been a trespass would depend upon whether the taking was from the ______________________________ of Perkins.

constructive possession

Whether or not Perkins retained constructive possession depended upon the degree of control he gave the jeweler. The jeweler could have torn the watch apart, replaced parts, kept it until repaired (within reason), and have had the right to hold it until paid. Therefore, taking and carrying the watch home was not a trespass even though the jeweler had intended to keep it because ____

____

Perkins had given the jeweler so much control that Perkins had not retained constructive possession, and therefore the taking had not been from the actual or constructive possession of Perkins.

Such cases (where the defendant had lawful possession and the victim had not retained constructive possession) represent great loopholes in the law of larceny. Statutes creating a crime of embezzlement were enacted to plug up some of the loopholes. Embezzlement will be analyzed later.

LA 34

An artist painted in his studio and exhibited his work for sale in a little gallery nearby. He hired an assistant to guide prospective buyers through the gallery, show the paintings, and if anyone were interested in buying, arrange a meeting with the artist. The assistant took a painting home, intending to permanently keep it. On a larceny charge he argued that this act was not a trespass because the taking had not been from the actual or constructive possession of the artist. Answer him:____________

____

____

____

The artist had given the assistant very little control of the pictures. The assistant had no right to handle them or sell them. Thus, the artist had retained constructive possession.

Suppose similar facts except that the assistant's job included framing the pictures, repairing them, hanging and arranging them, selling them, or lending them to prospective buyers. Again, he took a picture home, intending to keep it. And again, he argued no trespass because the taking had not been from actual or constructive possession of the artist. Could he be guilty of larceny?______ Explain:______________________________

____

____

____

____

No. The artist hadn't retained constructive possession because he had given the defendant so much control (selling or lending the pictures). This case will be discussed again when you analyze the statutory crime of embezzlement.

Thus you see, the issue of whether a person had retained constructive possession is determined by the degree of control he had given to another. This is a difficult question of fact. Courts have attempted to simplify the problem a bit by generalizations such as the following:

> A servant acquires mere custody and the master retains constructive possession.
>
> A bailee acquires possession and so much control that the bailor does not retain constructive possession.

These generalizations aren't too helpful for there is no magic in the words "servant" and "bailee." The test to distinguish a servant from a bailee is largely a matter of degree of control,so the issue still is determined by control retained by the victim. Opinions may differ in any particular case as to whether the victim had retained constructive possession or not, but all decisions would be based upon the same test--the degree of ______________________________

____

control retained by the victim.

If the victim gave a person a great degree of control, the victim would not retain constructive possession. A subsequent taking by the person would not be a trespass. To avoid this result, courts have indulged in various fictions to make constructive possession *revert* to the victim. Then a subsequent taking would be from the constructive possession of the victim and would constitute a trespass--and larceny.

For example, suppose that Wheeler took his watch to a jeweler to be repaired. Assume that he gave up so much control that he had not retained constructive possession. After repairing the watch, the jeweler dropped by Wheeler's office to return it. Wheeler wasn't in and the jeweler left it on Wheeler's desk. Later the jeweler decided that he wanted the watch himself, went back to Wheeler's office and took it (Wheeler was still out) with intent to keep it. Some courts have indulged in the fiction that the act of putting the watch on Wheeler's desk had put Wheeler back in control of the watch so that constructive possession had reverted to him, and thus the subsequent taking would have been from the ____________

____

constructive possession of Wheeler--a trespass.

Suppose that the jeweler repaired the watch, put it in a box, addressed it to Wheeler, and put stamps on the package and planned to mail it back to him during lunch hour. The jeweler changed his mind and kept the watch. The issue would be ________

____

____

____

whether or not the jeweler's act had returned control to Wheeler so that constructive possession had reverted to him, and the subsequent taking would have been from the constructive possession of Wheeler--a trespass.

Some courts indulge in the fiction that a breach of trust causes constructive possession to revert to the victim.

Suppose a storekeeper authorized his clerk to go to the bank to get some money and bring it back. Assume that the storekeeper did not have constructive possession of the money. The clerk received the money wrapped in a package. If, on the way back, he decided to abscond and did, the act would not have been a trespass because the taking would not have been from the constructive possession of the storekeeper. However, if the clerk had broken the package open to count the money, and if this were unauthorized and thus a breach of trust, some courts would indulge in the fiction that constructive possession could have reverted to the storekeeper. Then if the clerk subsequently absconded, the act could have constituted a trespass because ______________________________

____

the taking would have been from the constructive possession of the storekeeper.

The third requirement of a trespass is that the victim must have had some right to possession. However, title is immaterial.

Suppose that Sullivan had rented his car to Pike for a week. An emergency arose and Sullivan took his own car from Pike's garage with intent to keep it. Sullivan was charged with larceny. He argued that he had title to the car and couldn't be convicted of larceny of his own car. Answer him:__________________________

____

____

His argument is fallacious because title is immaterial. The taking could have constituted a trespass, since Pike had some right of possession.

Notice that the requirement is stated in terms of a person with some right of possession. Pike, who rented the car in the last case, only had some right of possession. By some right of possession the courts mean that the victim must have had a greater right of possession than the taker.

Brown stole a car. Green took and carried away the car from Brown's possession with intent to cause permanent unlawful deprivation. Green was charged with larceny. He argued that Brown, as a thief, hadn't had right of possession. This argument would fail. Brown wouldn't have had right of possession as against the true owner, but he had had right of possession as against Green. Therefore, Green may be convicted even though Brown was a thief because ____

____

Brown had had some right of possession--a greater right of possession than Green.

The fourth requirement of a trespass is that the victim must not have consented to the defendant's acquisition of possession. Consent negates a trespass.

You have already determined that where Smith lent his book to Jones, and Jones subsequently decided to keep it, a trespass occurred. Jones had intended to cause permanent unlawful deprivation. The taking had been from the constructive possession of Smith because Smith had given Jones so little control that Smith retained constructive possession. But now suppose that Jones argued, "No trespass occurred because Smith consented. He delivered the book to me." At first this argument may appear to be a formidable defense. However, if Smith had given Jones very little control, Jones had gained mere custody. Therefore, the answer to Jones' argument is, "Smith had not consented to your legal possession, but merely to your custody. Consent to possession negates a trespass. Consent to mere custody does not." The degree of control is important for two reasons:

1. the degree of control determines whether or not the victim retained ________________ ____________________.
2. the degree of control determines whether the victim consented to a person's acquisition of mere ______________ or of legal __________________.

constructive possession

custody

possession

You recall the case where the artist had hired an assistant to guide visitors through his gallery, and the assistant had taken a painting home with the intention of keeping it. The act constituted a trespass even though the artist had consented to the assistant's acquisition of control over the pictures because:

1.____

2.____

3.____

4.____

1. The defendant had intended to cause permanent unlawful deprivation.
2. The taking was from the constructive possession of the victim because the victim had given the defendant such a small degree of control.
3. The victim had some right of possession.
4. The victim had not consented to the defendant's acquisition of legal possession. The consent was limited to the defendant's acquisition of custody because the victim had given the defendant such a small degree of control.

Remember that fraud negates consent. Thus, in any case where a person fraudulently obtained another's consent to the acquisition of possession, the taking and carrying away could be a trespass. (The distinction between fraud in procuring consent and fraud such that the victim did not comprehend the nature of the act does not apply.)

Suppose a person asked to borrow another's car for a date. Actually, he had intended to drive the car to Mexico and keep it--and did. The acts would be a trespass because:

1.____

2.____

3.____

4.____

1. The defendant had intended to cause permanent unlawful deprivation.
2. The taking was from the actual possession of the victim.
3. The victim had some right of possession.
4. The victim's consent was negated by fraud.

In order for the fraud to negate the consent, the fraud must have induced the consent. Suppose, in the last case, where the person had lied about using the car for a date, the owner had said, "Certainly. I had already decided to make a gift of the car to you, and had told my wife to give you the keys." The act would not have been a trespass because ____________________

____

____

the owner had consented to the defendant's acquisition of possession. The consent was not negated by fraud because the fraud had not induced the consent.

Now you must consider a distinction that the courts have made. Assume that the victim had been induced by a person's fraud to consent to the person's acquisition of possession--a trespass. If the victim had intended that the person receive possession, the trespass could result in larceny. On the other hand, if the victim had intended that the person receive title, the trespass could result in the crime of false pretenses.

James told Mrs. Johnson that her husband had been arrested and needed bail. He also said that a bondsman friend of his would put up the bond and accept payment later if she could show some collateral. He then asked her to let him take her diamond watch to show to the bondsman and promised to return it to her immediately. The entire story was a lie. Mrs. Johnson handed the watch to him for the stated purpose. He absconded. The act could have constituted a trespass because Mrs. Johnson's consent

____

____

was negated by fraud.

The trespass could result in the crime of ________________ rather than __________________________________ because ____ larceny

false pretenses

Mrs. Johnson intended to pass possession, not title.

Now suppose that James had said, "The bondsman will put up the bail in exchange for your watch. Make out a bill of sale for the watch to me so that I can pass title to him." She complied and he absconded. The act could have constituted a trespass because her consent ______________________________ was negated by fraud.

The trespass could result in the crime of ________________ ____________________ rather than ____________________ because ____ false pretenses

larceny

she had intended to pass title, not mere possession.

Suppose James had said to Mrs. Johnson, "Your husband is in jail. I need your watch to get him out. Hurry!" She handed her watch to him. The act would have constituted a trespass because her consent was negated by fraud. What Mrs. Johnson had intended is difficult to prove, but whether the trespass would have resulted in larceny or false pretenses would depend upon whether ____

____

Mrs. Johnson had intended to pass possession (larceny) or title (false pretenses).

The four requirements of a trespass are:

1. Intent to cause permanent unlawful deprivation.
2. Taking from actual or constructive possession of the victim.
3. The victim must have had some right of possession--a greater right than the defendant.
4. The victim must not have consented to the defendant's acquisition of possession.

Statement of the requirements of the trespass is simple. Application of the requirements to some types of cases is somewhat involved and so requires special attention. In the analysis of the following cases, discuss all of the four requirements of a trespass that are in issue.

Consider cases where a person found personalty and kept it. First, assume that the previous owner had given up all interest and control in the personalty--he had abandoned the personalty. Would taking and carrying away abandoned personalty constitute trespass?________ Explain:____

____

____

____

No. 1. The taking and carrying away would not have been from the actual or constructive possession of the previous owner because he had given up all control over the abandoned personalty.

2. The victim would not have had some right of possession. He had abandoned all right of possession.

3. The victim would have consented. If the victim had abandoned the personalty, he gave implied consent to acquisition of possession by anyone.

Now assume that the personalty had not been abandoned but had been lost. Suppose that Lewis found Mills' lost personalty and took and carried it away, planning to give it to Mills the next day. Would the act constitute a trespass?_______

Explain:____

No. Lewis had not intended to cause permanent unlawful deprivation. (Note: No need to discuss the other three requirements.)

The owner of lost personalty is considered to retain constructive possession until another person takes control over the personalty. After another exercises control, the owner no longer has constructive possession. Therefore, when Lewis took possession inending to return the lost personalty to Mills, Lewis obtained lawful possession and control, and Mills no longer retained constructive possession.

Suppose that subsequently Lewis decided to keep the personalty for himself and refused to give it up to Mills. The retention would not be a trespass because ______________________

____

the possession had not been obtained from Lewis' actual or constructive possession. (Note: No need to discuss other three requirements.)

Suppose that Lewis found a watch on the beach which he recognized as Mills', and he knew that Mills had lost it. Now suppose that Lewis took and carried the watch home with the intention of keeping it for himself. Could the act be a trespass?

_________ Explain: ____

____

____

____

____

____

Yes. 1. The defendant had intended to cause permanent unlawful deprivation.

2. Taking was from constructive possession of Mills. The victim retained constructive possession until the defendant exercised control.

3. The victim had some right of possession.

4. The victim had not consented to the defendant's acquisition of possession.

Now suppose that Lewis hadn't known who had lost the watch and had taken it with intent to keep it for himself. Under the circumstances (owner unknown), a special rule comes into play. Keeping personalty is not a trespass if the finder had no reasonable means of discovering how he might return it. Keeping personalty is a trespass if the finder had reasonable means of discovering how he might return it.

Suppose the lost watch had initials and an address engraved on the back and Lewis took it with the intention of keeping it. The act would constitute a trespass because ______________________

____

Lewis had had reasonable means of discovering how he might return it.

Mills lost his watch. Lewis found it and kept it for himself. The watch had no identifying marks. Keeping the watch would not constitute larceny because Lewis had no ____________________________

____

reasonable means of discovering the owner.

Later Mills proved that the watch was his and claimed it. Lewis refused to give it up. Could the acts (finding and subsequently refusing to return the watch) have constituted a larceny?______ Explain:________________________________

____

____

____

____

No. The original taking had not been trespass because the defendant hadn't known or hadn't had reasonable means of finding out how to return the watch. The subsequent refusal to return the watch was not a trespass because Mills had not had constructive possession after the defendant had obtained lawful possession and control.

The principles you have just analyzed apply to lost personalty. Suppose that the victim had merely mislaid his personalty (left it by mistake at a particular place). If the personalty were merely mislaid, in all probability the owner would return and claim it. Thus, the courts consider that a finder has a reasonable means of returning the property to the victim. For example, if a person found a purse in a theatre, he should turn the purse in to the manager. This would be a reasonable means of returning the personalty to the owner. Therefore, a trespass would result in all cases where the finder takes and carries away the property with intent to keep it, knowing that it was mislaid. The difference in the application of the special rule to lost and to mislaid property is simple:

> If the finder knows that the property is mislaid and takes it with the intention of keeping it, the act is always a trespass.
>
> If the property is lost, the act is a trespass only if the finder has reasonable means of discovering how to return it.

Much of the same reasoning applies to personalty taken by mistake. Courts assume that a reasonable means of returning the personalty is available--take the personalty back to the place where it was mistakenly acquired. Further, constructive possession remains in the owner.

Ellis picked up several of his books from the library table and took them home. He discovered one book wasn't his, but kept it. Keeping the book constituted a trespass because:

1.____

2.____

3.____

4.____

1. The defendant had intended to cause permanent unlawful deprivation.
2. The taking was from the constructive possession of another.
3. The victim had the right of possession.
4. The victim had not consented to the acquisition of the book.

However, suppose Ellis hadn't taken the property by mistake, but rather it had been delivered to him by mistake. First, consider cases where the receiver realized that a mistake had been made.

Patterson's delivery boy delivered groceries to Hughes by mistake. Patterson hadn't expected payment until the end of the month. Hughes knew that an error had been made because he hadn't ordered any groceries. Nevertheless, he had taken the groceries with the intention of keeping them. Which of the four requirements of a trespass is/are in issue?____________________

____

____

The fourth requirement involving consent. Patterson's consent may have been negated by fraud. (Note: The other three requirements are obviously satisfied and so not in issue:

1. The defendant had intended to cause permanent unlawful deprivation;
2. The taking was from the constructive possession of the victim; and
3. The victim had the right of possession.)

Hughes could argue that Patterson had consented to his taking possession. The state would reply that the consent was negated by fraud. The issue would be whether the defendant's having accepted the groceries and having failed to inform the delivery boy of his error would have constituted fraud. Most courts have held that such conduct was a misrepresentation and did not constitute a fraud which negated the consent.

But suppose that Hughes had ordered groceries from another store and hadn't realized that a mistake had been made. Accepting the groceries under these circumstances would not have been a trespass because ____

____

____

____

there had been no intent to cause permanent unlawful deprivation. The defendant hadn't known that he had no right of possession and the defendant hadn't known that the victim had the right of possession. The victim's consent was not negated by fraud. (Note: No need to discuss the other three requirements.)

Later Hughes discovered the mistake but kept the groceries with no intention of returning them. Could this have been a trespass?_______ Explain:____

____

____

____

No. At the time that the defendant intended permanent unlawful deprivation, the personalty was not in the actual or constructive possession of the victim.

As a general rule, when personalty is delivered on condition, the owner retains constructive possession and the person receiving the property obtains mere custody until the condition is satisfied.

Suppose Jackson sent personalty to Peters COD. The delivery boy handed the personalty to Peters at his doorstep. Peters went into his house to get money to pay Jackson's delivery boy, but changed his mind and decided to abscond with the goods. Would Peters' receipt of the personalty at the door have been a trespass?

_______ Explain:____

____

No. Peters hadn't intended to cause permanent unlawful deprivation at the time he had accepted the goods.

Would Peters' subsequent absconding with the goods have been a trespass?_______ Explain:____

____

____

____

____

____

Yes. 1. The defendant had intended to cause permanent unlawful deprivation.

2. The taking had been from the constructive possession of Jackson. Constructive possession would remain in Jackson until the condition (payment) would be satisfied.

3. The victim had right of possession until the condition was satisfied.

4. The victim had consented to the defendant's acquisition of mere custody until the condition would be satisfied.

(Note: Statutes frequently divide larceny into petty larceny and grand larceny on the basis of the value of the personalty taken. The critical value varies from state to state. According to many statutes, petty larceny is a misdemeanor and grand larceny is a felony.)

SUMMARY OF PARTICULAR CRIMES

IV. Larceny and related crimes

A. Larceny

1. Personal property (personalty)
   a. Distinguish real and personal property. Test is:
      1) Degree of attachment or association with the land
      2) At the time of taking
   b. Distinguish personalty and mere evidence of personalty. At common law, mere evidence of personalty was not subject to larceny. This rule has been modified by statute in many states.

2. Intent to cause permanent unlawful deprivation
   a. Intention is required. Recklessness or criminal negligence will not suffice.
   b. Majority of courts require that the intention must be to cause permanent unlawful deprivation. A small number hold that intention to cause temporary unlawful deprivation will suffice.
   c. Unlawful
      1) Defendant must have known that he had no right to take the personalty.
      2) Defendant must have known the other had right of possession.
         (Note: The defendant need not have intended
            1) to commit a felony (mistake of law not a defense)
            2) to benefit himself (in most states))

3. Taking and carrying away
   a. Taking. Test is degree of control gained by defendant.
   b. Carrying away. Test is movement and control. The slightest movement is sufficient if the defendant had sufficient control to have completed the removal.
   c. Trespass. The taking and carrying away must have constituted a trespass. Four requirements for trespass are:
      1) Defendant must have intended to permanently deprive the victim.
      2) Taking and carrying away from actual or constructive possession of the victim.
         a) Victim must have gained some control over personalty
         b) Constructive possession implies the right of possession plus retention of some control.

(1) Cases where the defendant acquired property from the victim
   - (a) If the victim gave the defendant only slight control, the defendant gained mere custody and the victim retained constructive possession.
   - (b) If the victim gave the defendant a high degree of control, the defendant gained possession and the victim lost constructive possession. Subsequent converstion could not result in larceny, but will be considered in the section analyzing embezzlement.

Two fictions used by courts to "cause" constructive possession to revert to the victim so that a trespass and larceny may result are:

If the defendant placed personalty back into the victim's control, constructive possession reverted to the victim, and subsequent taking would be a trespass and larceny;

If the defendant breached a trust or fiduciary relationship, constructive possession reverted to the victim and a subsequent taking could be a trespass and larceny.

3) The victim must have had some right of possession.
   - a) Victim must have had greater right than defendant (Ex: A thief may commit larceny from a thief.).
   - b) Title is immaterial (Ex: A defendant may commit larceny by taking his own personalty from a victim who has greater right of possession at the time of taking.).

4) The victim must not have consented to the defendant's acquisition of possession.
   - a) Fraud negates consent. Acquisition by fraud may result in a trespass and larceny.
   - b) In order for fraud to negate consent, the fraud must have induced the consent.

If the defendant's fraud induced the victim to pass mere possession, the trespass may result in larceny.

If the defendant's fraud induced the victim to pass title, trespass may result in obtaining goods by false pretenses.

Note: The requirements that the taking and carrying away must be with intent to cause permanent unlawful deprivation and from the actual or constructive possession of another are the critical points in the following cases:

A. Abandoned property
   An owner loses constructive possession of property if he abandons it; thus, no taking of abandoned property is larceny.

B. Lost property
   An owner does not lose constructive possession of lost property until the finder exercises control over the property.
   1. If the finder knows the owner & keeps the property for him, no larceny results because there was no intent to permanently deprive, but the owner loses constructive possession. Therefore, if the finder subsequently keeps the property for himself and refuses to give it to the owner, no larceny results due to owner's lack of constructive possession.
   2. If a finder doesn't know the owner, a special rule applies:
      a. If a finder has no reasonable means of ascertaining owner, keeping is not larceny, even though the owner may subsequently be found.
      b. If a finder has reasonable means of ascertaining owner, keeping with intent to deprive is larceny.
         (Note: If finder knows goods are merely mislaid, courts assume reasonable means of ascertaining owner exists. Therefore, keeping with intent to deprive is larceny.)

C. If a person takes another's property by mistake and subsequently discovers the mistake but keeps with intent to permanently deprive the act constitutes larceny.

D. If personalty is delivered to a person by mistake and
   1. the defendant keeps the goods knowing of the mistake, the act is larceny.
   2. the defendant receives the goods, not knowing of the mistake, he has not committed larceny for he had no intent to permanently deprive. If he subsequently discovers the mistake and keeps the personalty, he has not committed larceny, because the owner had lost constructive possession.

E. If personalty is delivered on condition, constructive possession remains in the owner until the condition is satisfied. Thus, taking with intent to deprive before satisfaction of the condition is larceny.

PARTICULAR CRIMES

IV. Larceny and related crimes
  A. Larceny
  B. Embezzlement

You recall the case of the artist who hired an assistant to show people through his gallery. In the first example, the assistant had had very little control over the pictures; he could only show and guard them. Thus, he acquired mere custody. Constructive possession remained in the artist. If the assistant had absconded with a picture with intent to cause permanent unlawful deprivation, he could be guilty of larceny. The taking would have constituted a trespass because

1. ______________________________

2. ______________________________
____

3. ______________________________

4. ______________________________
____

1. The assistant had intended to cause permanent unlawful deprivation.
2. The taking had been from the constructive possession of the artist because the artist had given the assistant so little control.
3. The artist had had some right of possession.
4. The artist had not consented to the assistant's acquisition of possession. He had consented to the assistant's acquisition of mere custody because he had given the assistant so little control.

In the second example, the assistant was authorized to repair, sell, and lend pictures--lawful possession by consent. He had acquired so much control that the artist had not retained constructive possession. If the assistant had absconded with a picture with intent to permanently deprive the artist, he would not be guilty of larceny. The acts would not have constituted a trespass because ______________________________

____

____

taking had not been from the constructive possession of the artist, and the artist had consented to the defendant's acquisition of possession.

If the assistant were guilty of larceny in the first case, he certainly should not be free from criminal responsibility in the second. Cases where the original taking had not constituted a trespass (because the defendant had had lawful possession and the victim had not retained constructive possession) left an unfortunate loophole in the law of larceny. One method of plugging the loophole is to create the statutory crime of embezzlement.

A simple way to express the main distinction between larceny and embezzlement is this: Larceny always involves trespass. Embezzlement does not. These statements must be explained to be useful. Embezzlement occurs where a person originally acquired lawful possession of personalty by the victim's consent, with no intent to cause unlawful deprivation at that time. Thus, the original acquisition of possession had been lawful, not a trespass. Subsequently, the person must have used the personalty contrary to the victim's interests (a conversion), and at that time have intended to cause unlawful deprivation. However, the subsequent conversion was not a trespass because the victim had not maintained sufficient control to have retained constructive possession. Thus, neither the original acquisition of possession nor the subsequent conversion was a trespass.

Larceny always involves a trespass. Embezzlement never involves a trespass because the original lawful acquisition of possession was not a trespass and a subsequent conversion was not a trespass.

The second distinction is that some courts require an intention to cause permanent unlawful deprivation for embezzlement (as in larceny) while other courts have held that an intention to restore the property will not constitute a defense to embezzlement--thus, intent to deprive temporarily is sufficient.

The requirements for embezzlement are:

1. Lawful acquisition of property obtained by consent
2. Consent based upon a trust (fiduciary) relationship
3. Subsequent conversion
4. Intent to cause permanent (or temporary) unlawful deprivation
5. Personalty

Now analyze the case where the artist had given his assistant the right to repair, sell, and lend pictures and the assistant had absconded with a picture to Mexico, intending to remain there. Could the assistant be guilty of embezzlement?_______ Explain:

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Yes. 1. The acquisition of the property was lawful and had been obtained on a basis of trust which the victim had placed in the defendant. The acquisition was lawful because the victim had consented to the defendant's possession and consent was not negated by fraud. No trespass.

2. Trust or fiduciary relationship. The victim had trusted the defendant with complete control over the pictures to the point of selling them and delivering the purchase money to the victim.

3. Subsequent conversion. The defendant had absconded with a picture. He had exercised control contrary to the victim's interest. The conversion had not been from the constructive possession of the victim because the defendant had had so much control that the victim had not retained constructive possession. No trespass.

4. Intent to cause permanent unlawful deprivation. Stipulated.

5. The picture, of course, was personalty.

The first element of embezzlement is that the defendant must have acquired lawful possession. Distinguish possession and mere custody. If a victim gives a person a great deal of control, the person acquires lawful possession. If a victim gives a person very little control, the person acquires mere custody.

Suppose a man hired Kelly to polish his car. The man kept the keys. Kelly jumped the ignition switch of the car and drove away in it to Mexico, intending to stay there. Had Kelly acquired lawful possession?________ Explain:________________________

____

LA 75

No. He had had practically no control. He had acquired mere custody.

What crime should the state charge?__________________________

larceny

Suppose a man took his car to a mechanic who was to put the car in top condition, demonstrate it to buyers, sell it, and deliver the purchase money to the man. The mechanic fixed the car, decided to abscond to Mexico, and did, intending to remain there. Had the mechanic acquired lawful possession?______

Explain:____

____

Yes. He had had almost complete control. The first element of embezzlement would be satisfied--he had acquired lawful possession.

The mechanic's possession was lawful because the victim had consented to the possession on the basis of the trust relationship. If the consent had been obtained by fraud, receipt of the personalty would not have resulted in lawful possession, but rather it would have constituted a trespass and would have resulted in larceny rather than embezzlement.

Suppose an artist painted a picture that his assistant liked very much. The assistant said, "Let me buy that one."

The artist said, "No, I'm going to keep this one in my home."

The assistant replied, "Well, I have a frame at home that is just perfect for that picture. Let me take the picture home and frame it for you." All the assistant's statements were lies--he intended to abscond with the picture. The artist gave him the picture and the assistant absconded as planned. What crime should the state charge?______________________ Explain:________________

____

____

____

____

____

____

Larceny. The taking constituted a trespass.

1. The defendant had intended to cause permanent unlawful deprivation.
2. The taking had been from the actual possession of the victim.
3. The victim had had some right to possession.
4. The victim's consent had been negated by fraud.

Notice that if a person had obtained possession from actual or constructive possession of the victim by fraud, the act could be larceny. If the person already had had lawful possession by consent based on a fiduciary relationship, a subsequent fraudulent conversion would not have been from actual or constructive possession of the victim, and would be embezzlement. The distinguishing feature is not fraud. Fraud can occur in either larceny or embezzlement. The distinguishing feature is whether the taking had constituted a ____________________.

trespass

The definition of embezzlement requires that the lawful possession must have been acquired on the basis of a trust relationship. However, this does not mean that a person must have acquired possession directly from the victim.

The artist's assistant could repair, sell, or lend pictures. The artist ordered some supplies from an art store. The store delivered the supplies to the gallery just as the assistant was leaving, so the assistant told the delivery boy to put the supplies in the back seat of his car. The assistant planned to take the supplies to the artist's gallery the next morning. The assistant thus had obtained possession from the store's delivery boy, not from the victim; nevertheless, he had obtained lawful possession on the basis of the ___________________________ and a subsequent conversion could result in _____________________.

trust or fiduciary relationship

embezzlement

The second element of embezzlement is the trust relationship (fiduciary relationship). The degree of trust required is a troublesome question of fact. Usually embezzlement statutes specify the types of relationships covered, such as agents, bailees, public officers, etc. Statutes vary, but all apply the general principles that the defendant and victim must have shared a trust relationship and that the lawful possession of the personalty must have been obtained by consent based on the trust relationship.

The next essential element is the subsequent conversion. The conversion must not constitute a trespass--must not have been from the actual or constructive possession of the victim. Embezzlement would result only where the degree of trust and control the victim placed in the defendant had been so great that the victim had not retained constructive possession.

Kelly, who was hired to merely polish the car and was not given the keys, would not be guilty of embezzlement for three reasons:

1. ____

____

2. ____

____

3. ____

____

1. The defendant had acquired lawful custody, not lawful possession.
2. The defendant and the victim had not been in a fiduciary relationship.
3. The act would constitute a trespass, not merely a conversion. The victim had given the defendant very little control. Therefore, the victim had retained constructive possession. Thus, the taking of the car could have constituted a trespass, not merely a conversion.

A man took his car to a mechanic who was to put the car in top condition, demonstrate it to prospective buyers, sell it, and deliver the purchase money to the victim. The mechanic repaired the car and absconded with it to Mexico, intending to remain there. Do these facts satisfy the first three elements of embezzlement?______ Explain:____

Yes. 1. The defendant had acquired lawful possession (not just custody, for he was given considerable control) on the basis of the trust.

2. Fiduciary relationship. The victim had trusted the defendant to repair the car, sell it, and deliver the proceeds to him. This is a relationship of considerable trust.

3. Subsequent conversion. The defendant had used the car contrary to the interest of the victim. The conversion had not been from the constructive possession of the victim, for the defendant had been given so much control that the victim had not retained constructive possession. No trespass.

The next essential element of embezzlement involves intention. Recklessness or criminal negligence will not suffice. A defendant must have intended to cause unlawful permanent (or temporary, according to some courts) deprivation--the conversion must have constituted an intentional breach of the trust or fiduciary relationship. The defendant must have known that he had no right to use the personalty contrary to the interests of the victim.

Suppose the artist's assistant received his monthly compensation in the form of cash plus one picture. One month he chose a particular picture. The artist told him that he couldn't have that particular picture, but could have another. The assistant kept the picture he wanted and claimed that the employment contract gave him the right to select whatever picture he chose. The artist claimed that the employment contract gave him the right to select the picture of the month. The assistant's retention of the picture would not have been embezzlement because he ________________________________

____

had believed that he had a right to take the picture. Therefore, he hadn't intended to breach the trust relationship nor cause permanent unlawful deprivation.

Even though the assistant had not had the right to take the picture, the act still would not have constituted embezzlement because the assistant still had not intended permanent ____________________ deprivation. Mistake of ____________ is a defense.

unlawful

fact

The last essential element of embezzlement is that the property involved must be personalty. The same principles that you learned in larceny apply (LA 1 - LA 5). The elements of "taking and carrying away" that you analyzed in larceny are not in issue in embezzlement. The counterpart in embezzlement is the subsequent retention of the personalty which results in a conversion rather than a trespass.

SUMMARY OF PARTICULAR CRIMES

IV. Larceny and related crimes
   A. Larceny
   B. Embezzlement

1. Lawful acquisition of personalty by consent obtained on the basis of a trust or fiduciary relationship (no trespass).
   a. The victim must have consented to the defendant's acquisition of possession. The defendant must have received sufficient control to acquire lawful possession (not mere custody) and the victim must have lost constructive possession. The issue is determined by the degree of control. (If the defendant acquired mere custody, the taking could be a trespass and result in larceny rather than embezzlement.)
   b. The defendant's possession must have been acquired by the victim's consent on the basis of the trust relationship.
      1) If the defendant's possession were acquired on any other basis, the crime, if any, would not be embezzlement.
      2) If the victim's consent were negated by fraud, a trespass would result and the crime would be larceny rather than embezzlement.
      3) The defendant's possession need not have been acquired directly from the victim (ex: deliveries to the victim received by the defendant).

2. Trust or fiduciary relationship: usually specified by individual statutes

3. Subsequent conversion: use of the personalty by defendant contrary to interest of the victim. Conversion is not a trespass because constructive possession was not retained by victim and defendant was in lawful possession. If subsequent acts were trespass, the result could be larceny rather than embezzlement.

4. Intention (recklessness or criminal negligence will not suffice)
   a. Intention to cause unlawful permanent (or temporary, according to some courts) deprivation--an intentional breach of the trust relationship. The defendant must have known that he had no right to use the personalty contrary to the interests of the victim.
   b. Mistake of fact is a defense. Ignorance of the law is not a defense.
   c. The principles of intention which apply to larceny also apply to embezzlement.

5. Personalty: principles concerning "personalty" which apply to larceny also apply to embezzlement.

PARTICULAR CRIMES

IV. Larceny and related crimes
    A. Larceny
    B. Embezzlement
    C. False Pretenses

You recall that if a victim's consent to a defendant's acquisition of the personalty were negated by fraud, the acts could constitute a trespass. You also recall that if a victim intended to pass possession only, the trespass could result in larceny. If a victim intended to pass title, no common law larceny resulted. The statutory crime of false pretenses is used to plug this loophole. Thus, the main distinction between larceny and false pretenses is the intention of the victim. A trespass may result in larceny if a victim had intended ____________

____

A trespass may result in the crime of false pretenses if the victim intended ____ to pass possession only

to pass title

(Note: If a defendant induced a victim to intend to pass title by use of counterfeit money or false token, the crime would be common law cheating. Thus, the statutory crime of false pretenses fills the gaps left by common law larceny and common law cheating.)

Suppose that Jones advertised a television set for sale for $100.00. A buyer contracted to purchase the set and take delivery the following day. The next day the buyer came to pick up the set. Jones said, "You haven't paid."

The buyer said, "Haven't you received my check yet? I mailed it to you last night. You'll no doubt get it in the next delivery."

This was a lie and the buyer had intended to abscond with the set. Jones allowed him to take the set. The buyer's act constituted a trespass because

1. ______________________________

2. ______________________________

3. ______________________________

4. ______________________________

1. The defendant had intended to cause a permanent unlawful deprivation;
2. The taking had been from the actual possession of the victim;
3. The victim had had some right of possession;
4. The consent had been negated by fraud.

The trespass would have resulted in obtaining personalty by false pretenses because Jones' ________________________________

____

had intended to pass title to the defendant.

Suppose Jones had said, "You may use the set until tomorrow. If I receive the check, you may keep the set. If the check doesn't come tomorrow, bring the set back." The trespass would have resulted in larceny because ________________________________

____

the victim had intended to pass possession only.

Notice a few characteristics of the fraud. The first is that the misrepresentation must in fact have been false. If the defendant's statement had happened to be true, no crime would have resulted even though the defendant had thought it was a lie and had intended to perpetrate a fraud on the victim. Further, the misrepresentation must have been of a past or present fact, not a statement of what will occur in the future or merely a statement of opinion.

A broker said, "This stock will double in value in three weeks." He believed this to be a lie. On the basis of this statement a buyer paid the broker a sum of money for the stock. The stock tripled in value in three weeks; subsequently the company went bankrupt. The broker would not have been guilty of false pretenses for two reasons:

1. ____

____

2. ____

____

1. The statement was in fact not false. The defendant's belief that it was false didn't make the statement false.

2. The statement referred to a future event rather than a present or a past event.

If the broker made a sale by stating that the stock would double in value in two weeks and it did not, he could defeat a charge of obtaining money by false pretenses by pointing out that his statement was merely a statement of ________________________.

opinion

A fraudulent promise to do something in the future is not sufficient for a charge of false pretenses. If the defendant obtained the victim's personalty by falsely stating that the defendant had paid the victim's partner, the defendant could be guilty of false pretenses. But if the defendant obtained the victim's personalty by falsely stating that the defendant would pay in six weeks, the defendant would not be guilty of false pretenses because ____

____

a mere promise to do something in the future is not sufficient. (Not all courts recognize this distinction.)

The misrepresentation must actually have deceived the victim, and must have been an inducement that caused the victim to pass title to the defendant.

Suppose that the victim wanted to buy the defendant's boat. The defendant told the victim all sorts of lies about it. The victim knew that they were lies, but wanted the boat and bought it. The defendant could not be guilty of false pretenses because

1.____

2.____

1. the defendant had not been deceived;
2. false pretenses had not induced the sale.

Suppose that the defendant lied to the victim about the boat and the victim believed him. The victim asked the advice of an expert who honestly recommended buying the boat. The victim bought the boat on the basis of statements the defendant had made and on the basis of the expert's recommendations. The defendant could be guilty of false pretenses because ______________________

____

the victim had been deceived and the defendant's misrepresentations had been an inducement to the victim to buy the boat.

(Note: The defendant's misrepresentations need not have been the only inducement.)

Suppose that a person falsely represented that his twenty-year-old car could run at 100 mph and get 50 miles per gallon. The victim bought on the basis of these lies. A few courts have held that if the victim were grossly careless in buying on such a basis, the person would not have been guilty of false pretenses. This is a minority view.

The element of intention is about the same as in larceny. The defendant must have intended to cause permanent unlawful deprivation. This requirement implies that the defendant must have

1. intended to misrepresent facts to the victim and
2. intended the misrepresentation to induce the victim to give up the personalty.

Consider the case where a person came to pick up the TV set and told the storekeeper that he had mailed a check. Suppose the person had believed that his wife had mailed a check. Taking the set away could not have constituted obtaining personalty by false pretenses because the person had not intended to cause permanent unlawful deprivation because ______________________________

____

the defendant had not intended to misrepresent the facts and avoid payment. Mistake of fact is a defense.

Suppose a mechanic falsely stated to the victim that the victim's car needed work so badly that it wasn't reliable. The mechanic intended to make a nice profit on the repairs. The victim thought about it for a week and decided that the best solution was to sell the car. The victim offered the car to the mechanic at a fraction of its value and he bought it. He could not be guilty of false pretenses even though he knowingly had lied to the victim, and even though the lie had induced the victim to sell, because ____

____

the defendant had not intended the lies to induce the victim to sell the car.

SUMMARY OF PARTICULAR CRIMES

IV. Larceny and related crimes
- A. Larceny
- B. Embezzlement
- C. False pretenses

1. Personalty: same principles as in larceny

2. Taking and carrying away: same principles as in larceny
   - a. Defendant must have obtained possession by fraud.
     - 1) Taking possession by fraud must have constituted a trespass.
       - a) The defendant must have intended to cause unlawful deprivation.
       - b) The taking must have been from the actual or constructive possession of the victim.
       - c) The victim must have had some right of possession.
       - d) Consent is negated by fraud.
     - 2) Distinguished from larceny
       If the defendant's fraud induced the victim to intend to pass possession only, the trespass would result in larceny.

       If the defendant's fraud induced the victim to intend to pass title, the trespass would result in false pretenses.
   - b. Features of the fraud
     - 1) Misrepresentation must in fact have been false. Defendant's belief that his statement to victim is false is not sufficient.
     - 2) Misrepresentation must have been of a past or present fact.
     - 3) Misrepresentation must not have been a mere opinion.
     - 4) Statement must not have been a promise to do something in the future.
     - 5) Victim must actually have been deceived. (A few courts hold that the defendant must not have been grossly careless.)
     - 6) Misrepresentation must have induced the victim to pass title, but need not have been the entire inducement.
3. Intent to cause unlawful deprivation: in general, same principles as in larceny. Note that:
   - a. Defendant must have intended to misrepresent facts to victim.
   - b. Defendant must have intended his misrepresentation to induce victim to pass title.

PARTICULAR CRIMES

IV. Larceny and related crimes
    A. Larceny
    B. Embezzlement
    C. False pretenses
    D. Robbery

Robbery is larceny committed by violence. The violence must

1. have been used to acquire possession of the personalty;
2. have been directed against the person of the victim;
3. have involved force or intimidation;
4. have been against the victim's will or consent.

Suppose a drunk took Jim's bottle of liquor when the victim left the table. When Jim returned he demanded his bottle. The drunk refused to return it, they fought, and the drunk retained possession by violence. What crime should the state charge--larceny or robbery?________________ Explain:____________________

____

____

larceny. The act would not have been robbery because the violence had not been used in order to acquire possession of the personalty. Retention by violence does not constitute robbery.

Suppose Valentine blew a wall safe open in Peterson's home and took some money while Peterson was in Europe. The taking involved violence, but would not have constituted robbery because

____

the violence had not been directed against the person of the victim.

If violence had been used to help acquire possession and had been directed against the person of the victim, the fact that the actual "taking" had not been in the presence of the victim is immaterial.

Suppose McHorn broke into Sullivan's bedroom, held a gun at Sullivan's head, and said, "Where's your money?" Sullivan told him that it was in the desk drawer in the living room. After McHorn locked Sullivan in the bedroom he went downstairs and took the money from the drawer. The act was robbery even though the taking had not been in the presence of the Sullivans because ______________

____

the violence had been used to help acquire possession and had been directed against the person of the victim.

Violence involves either force or intimidation. First, consider force. Force implies overcoming some resistance. Thus, if the defendant encountered no resistance, the taking ordinarily would have been non-violent. However, if some resistance was encountered, the slightest force necessary to overcome the slightest resistance would be sufficient.

Allen was holding his wallet in his hand and Wilson snatched it away. The action was so quick that Allen did not resist. The act would not have been robbery due to a lack of ________________.

force and thus lack of violence.

If Allen had anticipated the act and had tried to hold onto his wallet but couldn't, the act would have been robbery because ____

____

____

the victim had resisted and the defendant's force was sufficient to overcome the resistance. The slightest force to overcome the slightest resistance is sufficient to constitute violence.

Suppose Kelly picked a watch from McKenna's pocket. The act would not have been robbery due to the lack of violence.

Suppose the watch were attached by a chain and Kelly had had to snap the chain. The act would have been robbery because

____

____

____

the chain had offered some resistance and the defendant had overcome the resistance. The slightest force necessary to overcome the slightest resistance is sufficient for violence.

Violence may result from intimidation. No actual display of force is necessary for intimidation. Jerkin said to Lawson, "Give me your money or I'll kill you." This could have constituted robbery even though Jerkin had exerted no force at all. However, the defendant must have put the victim in fear--intimidated him--and a reasonable man also, in his place, would have been intimidated (reasonable intimidation).

Peter said to Ann, "Give me your money or you'll be sorry." If Ann had believed that Peter meant to kill her and so gave up possession, but a reasonable person in her place would not have been intimidated, the taking would not have been by violence. The issue, then, is whether or not ______________________________

____

the victim had been intimidated and a reasonable person also would have been intimidated (reasonable intimidation).

You might suspect that the intimidation necessary for robbery would necessarily involve violence to the person. However, some courts have found the defendant guilty of robbery where the defendant threatened to burn the victim's house. This result seems inappropriate since the gist of robbery involves violence to the person.

You recall that in absence of fraud, the taking and carrying away would not constitute larceny if the victim had consented. Of course, the same principle applies to robbery. The taking must have been against the will or consent of the victim.

Suppose Goodbody stepped up behind Prather, knocked him unconscious, and took his wallet and carried it away. The issue would be whether the taking would have been against the will of the victim when the victim was unconscious. Where a defendant had rendered a victim unconscious, of course the courts imply that the taking was against ________________________________.

the consent or will of the victim.

(Note: 1. The requirement of intention for robbery is the same as for larceny. A mistaken claim of right--mistake of fact--is a defense, even though the taking was accomplished by violence. Mistake of law is not a defense.)

2. Larceny was divided into petty larceny (misdemeanor) and grand larceny (felony) on the basis of value of the personalty. No such distinction is made in robbery. Robbery is a felony regardless of the value of the personalty.)

SUMMARY OF PARTICULAR CRIMES

IV. Larceny and related crimes
- A. Larceny
- B. Embezzlement
- C. False pretenses
- D. Robbery

All the elements of larceny must be satisfied with the following additions:

1. The taking of the personalty must have involved violence. The violence must
   - a. have been used to acquire possession of the personalty;
   - b. have been directed against the person of the victim;
   - c. have involved force or intimidation.
     - 1) Force: the slightest force necessary to overcome the slightest resistance is sufficient.
     - 2) Intimidation:
       - a) Reasonable intimidation: the victim must have been intimidated and a reasonable man in his place also would have been intimidated.
       - b) Usually intimidation must be of the person, but some courts have held robbery where threats were directed against the victim's house.
     - 3) Against consent or will of the victim

2. Value of personalty: robbery is a felony without regard to value of personalty taken.

PARTICULAR CRIMES

IV. Larceny and related crimes
    A. Larceny
    B. Embezzlement
    C. False pretenses
    D. Robbery
    E. Receiving stolen goods

The definition of the crime of "receiving stolen goods" requires the taking of stolen goods knowing them to be stolen, with intent to cause unlawful deprivation.

The first element is that the personalty must be "stolen." The crime of receiving stolen goods is governed by statute. Some statutes require that the personalty have been obtained by larceny or robbery. Other statutes require that the personalty have been obtained by larceny, robbery, embezzlement, or false pretenses. Thus, in a particular state, the statute and cases construing the statute must be analyzed to determine what crimes are encompassed by the term "stolen."

In any event, the crime of receiving stolen goods applies only to personalty because larceny, robbery, embezzlement, and false pretenses are applicable only to ______________________.

personalty

The personalty must in fact have been stolen. The defendant's belief that the personalty was stolen is not sufficient.

A "fence" frequently bought stolen jewelry from a thief. On one occasion the fence bought a watch from the thief which he believed the thief had stolen. Actually, the thief had received the watch as a present. The fence would not be guilty of receiving stolen property because ____________________

____

in fact the watch had not been stolen.

The personalty must have been stolen and must have retained its "character as stolen property" at the time the defendant received it.

A thief stole Jane's jewels. The thief was caught and the jewels were recovered and returned to Jane. The police obtained possession of the jewels from Jane in order to trap Paul. A police officer pretended to be a fence and "sold" the jewels to Paul who believed that he was buying stolen property. Paul would not have been guilty of receiving stolen property, even though the jewels had been stolen originally, because ______________________

____

as of the time the defendant received the goods they were no longer "stolen" property.

A thief stole some jewels. He traded the jewels for a boat. He sold the boat to West who knew of the theft of the jewels and the subsequent trade for the boat. West would not be guilty of receiving stolen property because ______________________________

____

the boat was not stolen property, even though it had been traded for stolen property.

Personalty retains the character of stolen property even though the thief may have given it to an agent to deliver to the defendant. However, suppose the thief sold stolen personalty to a fence, who subsequently sold it to Alter. The fence, of course, would have been guilty of receiving stolen property, but courts are divided about Alter's criminal responsibility. Some courts hold that the personalty was no longer "stolen" after it had passed from the thief, or someone acting for him, to another party. Even though the courts are divided as to how the rule should be applied, they all apply the same rule:____________________________

____

the property must retain its character as stolen property as of the time the defendant received it.

The second element is that the person must have "received" the personalty. Physical receipt is not required--constructive receipt will suffice. Constructive receipt for purposes of receiving stolen property implies acceptance of control over the personalty.

Suppose that both a fence and a thief had a key to the same safety deposit box. According to their usual plan of operation, the thief would steal personalty, put it in the box, and inform the fence, who would inspect the personalty and pay the thief if he wanted to buy. On one particular occasion the thief said to the fence, "I just stole a bracelet that exactly matches the one you bought last week. I put it in the box and the price is the same. Do you want it?" The fence nodded and paid. The fence would have constructive receipt as of the time he agreed because he then ____ over the jewels.

accepted control.

The third essential element involves intention. Recklessness or criminal negligence will not suffice. The person must have intended to receive stolen personalty knowing that it was stolen as of the time he received it. Facts which would make a reasonable man suspicious and lead to an inquiry which would show that the personalty was stolen are not sufficient. The person must have known that the personalty was stolen.

Suppose that the fence had bought stolen jewels from Ferguson over a span of years. Ferguson stole a ring and sold it to the fence. When the fence was charged with receiving stolen property he argued that he hadn't asked the thief if the ring were stolen, and so in fact he hadn't known whether or not it was stolen. If the jury believed him, they could find him not guilty. If the state could prove that, over a ten year period, everything that the thief had sold the fence had been stolen, the fence probably would be convicted. If the fence could prove that 25% of the time the jewels hadn't been stolen, the jury would have a more difficult decision. In any event, no matter what the jury's conclusion, the decision would be based on the rule:______________________________

____

the defendant must have intended to receive stolen personalty, knowing that the personalty was stolen at the time he received it.

Paulsen bought a television set from Jackson which Jackson had stolen. Paulsen was unaware of the theft until the owner recognized it and claimed it. Although Paulsen refused to return the set to the owner, he would not be guilty of receiving stolen goods because ______________________________

____

he hadn't known that the television set had been stolen as of the time he received it.

As in larceny, some texts state that for "receiving stolen goods" a person must have entertained a "felonious intent." This is unfortunate terminology. A person need not have intended to "commit a felony"--ignorance of the fact that receiving stolen goods is a crime would not be a defense. "Intent to commit a felony" is immaterial. A person must have intended to receive stolen property knowing that it was stolen and intending to cause unlawful deprivation to the victim.

Suppose Jackson complied with the police request that Jackson pretend to be a fence and buy stolen property from a thief. Jackson would not be guilty of receiving stolen property, even though he intentionally received stolen personalty, because ________________

____

he hadn't intended to unlawfully deprive the victim.

Pinder intentionally bought jewels that he knew had been stolen from his friend in order to return them to his friend. Therefore, even though Pinder had intended to receive personalty that he knew had been stolen, he would not be guilty of receiving stolen property because ____

____

he had not intended to unlawfully deprive his friend.

Unlawful deprivation is used in a broad sense in a context such as this: Suppose a thief stole Franklin's car. A buyer purchased the car from the thief with the intention of extracting a reward from Franklin for its recovery. This would have constituted receiving stolen property because even though the buyer might eventually return the car for the reward, he had intended to ______________________________________ Franklin.

unlawfully deprive.

Such intention must have existed at the time the person received the personalty.

Suppose Pinder bought stolen jewels from a thief. At the time, Pinder didn't know the jewels were stolen and so had not intended to deprive. Later he learned that the jewels had been stolen from Astor, but he decided to keep them for himself. Could he be guilty of receiving stolen property?_______ Explain:

____

____

____

No. The defendant hadn't intended to unlawfully deprive the victim at the time he received the personalty. Subsequent intent to unlawfully deprive is immaterial.

SUMMARY OF PARTICULAR CRIMES

IV. Larceny and related crimes
  A. Larceny
  B. Embezzlement
  C. False pretenses
  D. Robbery
  E. Receiving stolen goods

1. Property must have been stolen
   a. Crimes included within the term "stolen" are usually defined by statute.
   b. Property must have been personalty; same principles apply as in larceny.
   c. Personalty must in fact have been stolen at time of receipt by defendant. Courts disagree on whether personalty remains "stolen" after personalty passes through hands of one "fence."

2. Defendant must have received the personalty
   Either actual or constructive receipt would suffice. The test for constructive receipt is control.

3. Intention
   a. Intention to receive personalty knowing that it was stolen
      1) Facts which would make a reasonable man suspicious and lead to an inquiry which would show that the personalty was stolen are not enough.
      2) Defendant's knowledge that personalty was stolen must have existed at the time he received the personalty.
   b. Intention to deprive
      1) Defendant must have intended to unlawfully deprive. Mistake of fact is a defense. Mistake of law is not a defense.
      2) Intent must have existed at the time of receipt. Subsequent intent to deprive is immaterial.

Roberts hired Moore to sell used cars on Roberts' lot. Moore was authorized to demonstrate cars, negotiate terms of the sales contract, and receive the down payment or deposit. However, Moore was to submit the contract to Roberts for his approval. All sales were made from the lot. After several months, Moore planned to abscond with a car to Mexico and not return. He said to Roberts, "My lodge is throwing a big party tonight. A member is just ready to buy. Let me take that car to the party and sell it to him. It would help if you could trust me to make the contract without your approval." Roberts approved and gave the defendant the keys. Of course, the story was a lie and Moore was caught driving the car to Mexico. What crime should the state charge--larceny, embezzlement, or false pretenses? Discuss fully.

The state should charge Moore with larceny. The first essential element of larceny (personalty) and the second essential element of larceny (intention) are clearly satisfied and no discussion is required.

The third essential element of larceny involves the "taking and carrying away." The car was obviously taken and carried away. The issue is whether or not the acts constitute a trespass. The essential elements of a trespass are:

1. Intent. Clearly satisfied.
2. Taking and carrying away must have been from the actual or constructive possession of the victim. Here, the taking was from the actual possession of Roberts.
3. Roberts must have had some right of possession. Obvious.
4. Roberts must not have consented. Moore could argue that since Roberts had consented, no trespass resulted. He could also argue that since he and Roberts had shared a fiduciary relationship, the crime charged, if any, should be embezzlement. Roberts had consented, but consent was negated by fraud. Therefore, the acts constitute a trespass and may result in larceny even though the parties had shared a fiduciary relationship.

   Where consent was obtained by fraud, if the victim had intended to pass mere possession, the trespass would result in larceny. If the victim had intended to pass title, the trespass would result in obtaining goods under false pretenses. Roberts hadn't intended to pass title to Moore. Rather, Roberts had given Moore the right to represent him for the purpose of making a sales contract. Therefore, the trespass would result in larceny rather than false pretenses.

   Even though the parties had shared a fiduciary relationship, Moore would not be guilty of embezzlement because

a. he had not obtained lawful possession through the fiduciary relationship. He had obtained unlawful possession by fraud--a trespass.
b. The taking had been from the actual possession of Roberts.

Thus, Moore should be charged with larceny because all of the essential elements are satisfied. Moore would not be guilty of embezzlement or false pretenses for the reasons given.

Jones hired Smith to manage his bar. Smith was authorized to order supplies, sell drinks, deposit cash in the owner's bank account, etc. The ceiling of the tavern was painted dark blue and had 1,000 fifty-cent coins embedded in plaster to simulate stars. After several months' employment, Smith decided to take some items, go to Mexico and not return. He pried the coins loose from the ceiling and put them on a table. He took bills from the cash register, a painting from the wall and some liquor, and piled them on the table. He then carried all the items to his car and drove away. He was captured on the outskirts of town. Discuss criminal responsibility for larceny and all related crimes in issue.

Smith was charged with larceny. The first essential element of larceny is that the property involved must have been personalty.

The test to distinguish personalty and realty is the degree of association with the land at the time the property was taken. All items except the coins were not associated with the building or land and so were personalty. The coins were embedded in the ceiling and thus were associated with the building.

The test is applied as of the time the property was taken and carried away. If the court applied the test at the time the coins were taken from the ceiling, the coins might be classified as realty. If the court applied the test at the time the coins were taken from the premises, the coins would be classified as personalty, for they had been separated from the ceiling for a period of time. The taking and carrying away were complete when the coins were removed from the ceiling. However, the courts would probably be apt to apply the test as of the time the coins were removed from the premises to avoid such a technical defense.

The second essential element of larceny involves intent to cause permanent unlawful deprivation. Smith had intended to take and carry away the personalty knowing that he had no right of possession, and knowing that someone else had the right of possession. Since the defendant admitted that he had intended to go to Mexico and not return, he had intended to cause unlawful permanent deprivation. Thus, this element is satisfied with respect to all items.

The third essential element of larceny is taking and carrying away. All items were taken and carried away. The issue is whether or not these acts constitute a trespass. The answer is developed in the analysis of the trespass.

1. Intent: already discussed and satisfied.

2. The taking and carrying away must have been from the actual or

constructive possession of the victim. The taking was not from the actual possession of Jones. Constructive possession depends upon control. If Jones had given Smith only a little control, Jones retained constructive possession. Smith was the manager. He could order and sell drinks, pass title, use money and make change, and deposit money in Jones' account. Thus, Jones had given Smith such great control over the liquor and bills in the cash register that Jones had not retained constructive possession. Thus, the taking and carrying away of the liquor and bills would not have been from the constructive possession of Jones and would not constitute a trespass.

The state might argue that when Smith put the bills in Jones' cash register, constructive possession returned to Jones. This obvious fiction is not a good argument because Smith still had the right to use the money to make change and to deposit for Jones.

The state might argue that when Smith took the liquor and bills he breached a fiduciary relationship and this breach caused constructive possession to revert to Jones. The difficulty with this argument is the time sequence. At the time Smith took the personalty the constructive possession had not reverted to Jones. Therefore, the taking was not from the constructive possession of Jones.

The picture and the coins were not under Smith's control to such a great degree. He had had no right to manipulate or use them. Thus, constructive possession remained in Jones and taking of the picture and the coins was from constructive possession of Jones.

3. The victim must have had some right of possession. Jones had the right of possession to all items.

4. The victim must not have consented to the defendant's acquisition of possession. Smith could argue that on the basis of the fiduciary relationship, Jones had consented to his possession. If Jones had given Smith only a little control, Jones would have consented to Smith's acquiring mere custody, not possession. Thus, Jones had consented to Smith's custody of the picture and the coins but not to possession. Where Jones had given Smith great control, Jones had consented to possession. Thus, Jones had consented to Smith's possession of the liquor and money.

Smith may be guilty of larceny of the picture and the coins because all elements of larceny are satisfied. The defendant not be guilty of larceny of the liquor and bills. The taking and carrying away did not constitute a trespass because the liquor and the bills had not been taken from the constructive possession of Jones and because Jones had consented to the defendant's lawful possession.

* * * * *

Smith was charged with embezzlement.

The first essential element of embezzlement is that the defendant must have lawfully acquired the personalty on the basis of trust or fiduciary relationship. Smith and Jones had shared a fiduciary relationship. However, it doesn't follow that Smith had acquired lawful possession of all items on the basis of the fiduciary relationship. Jones had given Smith a great deal of control over liquor and bills and thus had consented to his lawful possession of these items on the basis of the fiduciary relationship. However, Jones had given Smith only slight control over the picture and coins. Jones hadn't consented to Smith's acquisition of possession of the picture and coins. He had consented merely to Smith's custody of these items. Therefore, the first element of embezzlement is satisfied with respect to the liquor and bills, but the first element is not satisfied with respect to the picture and coins.

The second element (fiduciary relationship) is satisfied.

The third element is the subsequent conversion. A conversion requires lawful acquisition of possession and a subsequent use of the personalty contrary to the interest of the victim (no trespass). The liquor and bills had been in lawful possession of Smith and Smith had subsequently used them contrary to Jones' interest (a conversion). These acts did not constitute a trespass because Jones had not been in actual or constructive possession of the liquor and bills. Smith had mere custody of the coins and picture. Constructive possession of these items had remained in Jones. Therefore, the taking of the picture and coins had been from constructive possession of Jones (a trespass). The third element of embezzlement is satisfied with respect to the liquor and bills. The third element is not satisfied with respect to the coins and pictures.

The last two elements of embezzlement (intention and personalty) are satisfied with respect to all items. No discussion is required here for these were previously discussed in the analysis of larceny.

Smith could be guilty of embezzlement of the liquor and bills because all essential elements are satisfied. Smith could not be guilty of embezzlement of the coins and picture because Smith had not had lawful possession of these items, and the taking of these items had been from the constructive possession of Jones and thus was a trespass.

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Murphy owned and operated a private dump. The entrance had a sign which said, "All items dumped on the premises become the exclusive property of the owner." Thomas entered the rear of the dump and found an old washing machine. Thomas pulled the motor almost out of the machine, but one wire was still stuck. He then noticed that the motor had certain defects and left without it. Discuss criminal responsibility for larceny.

The first essential element of larceny is that the property must have been personalty. Satisfied.

The second essential element is that the defendant must have intended unlawful permanent deprivation.

Thomas must have intended to take the personalty knowing that he had no right of possession and knowing that someone else had some right of possession. Thomas would argue that the motor had been abandoned--that the previous owner had given up all interest in it, and so Thomas had had the right to take it. The state would argue that Thomas should have known that Murphy had had a superior right. Assuming that Murphy actually had had a superior right, Thomas was mistaken, because he had entered from the rear and hadn't seen the sign. Thomas is, in effect, arguing that his mistake of fact is a defense. The state is arguing that his error is not a reasonable mistake of fact and should not be a defense.

For an error to be a defense, the following requirements must be met:

1. The error must have been a mistake of fact, not ignorance of law. Here, Thomas was mistaken as to a fact--that no one, in fact, claimed possession.

2. The mistake of fact must have been operative.
   a. If the crime is based upon intention or recklessness, any mistake of fact the defendant actually had made is operative. Larceny and related crimes require intention. Thus, Thomas' mistake is operative, whether a reasonable man would have been mistaken or not.

   b. If the crime is based upon criminal negligence, only a reasonable mistake of fact is operative. Since larceny and related crimes require intention, this is immaterial. Thus, the state's point (that the error must have been a reasonable mistake) is not an effective argument.

3. If, in light of the operative mistake, the event would not have constituted a crime, the mistake of fact would be a defense. In light of the mistake, Thomas had not intended to take personalty which he knew he had no right to possess, and which he knew someone else had the right to possess. In light of the mistake, Thomas had not intended to cause unlawful permanent deprivation. The essential element of "intention" is not satisfied.

The third essential element involves the "taking and carrying away."

The test for "taking" is control. The defendant had manipulated and controlled the motor. The test for "carrying away" is that the slightest movement is sufficient, if the defendant had had sufficient control to complete the removal. The defendant had moved the motor but the motor had still been attached to the machine by a wire. The defendant hadn't gained sufficient control to have completed the removal. Therefore, the motor had not been "carried away." Also, the taking must have constituted a trespass. The requirements for trespass are:

1. Intention. Not satisfied as shown.
2. Taking and carrying away from actual or constructive possession of the victim. There had been no carrying away as shown above.
3. The victim must have had some right of possession--a greater right than the defendant. Assumed.
4. The victim must not have consented. Assumed.

Thus, the taking would not have constituted a trespass because the first two elements are not satisfied.

The acts would not have constituted a larceny because:

1. The defendant had not intended to cause unlawful permanent deprivation. Mistake of fact is a defense.
2. The motor had not been carried away and the acts had not constituted a trespass.

PARTICULAR CRIMES

V. Burglary

The common law definition of burglary involves the breaking and entering in the nighttime of the dwelling of another with intent to commit a felony therein. Each element of this definition is essential. Therefore, if a person entered in the nighttime the dwelling of another with intent to commit a felony therein, he would not have committed common law burglary unless his acts also had constituted a ______________________ of the dwelling.

breaking

The first essential element of burglary is a "breaking." The legal meaning of the term breaking involves the concept of the use of force by a person who did not have the right to enter. A breaking requires the use of either real (actual) force or fictional (constructive) force. Initially, you will be concerned with actual force.

Suppose Peterson had invited an insurance salesman to his home to discuss the purchase of a policy. The salesman rang Peterson's doorbell and Peterson opened the door to let him in. From the threshold the salesman saw a painting on the living room wall, and he entered Peterson's dwelling with the intention of stealing it. The salesman's conduct did not constitute a breaking because ____

____

his acts had not involved the use of actual force.

Note that the "breaking" and the "entering" are two separate elements and each must be satisfied independently. The act of entering with intent to commit a felony does not necessarily constitute a breaking. Therefore, proof that the insurance salesman had entered with intent to steal the picture does not automatically prove the essential element of a "____________________" with intent to steal the picture.

breaking

If the breaking were accomplished by the use of actual force, the amount of force involved may vary from a violent explosion, to a rap with a hammer, to the softest touch of a finger. Therefore, the minimum amount of force required for a breaking frequently is in issue. Since the purpose of the force usually is to remove some impediment to ingress, the slightest force that could remove the _______________________ to ingress is sufficient.

impediment

A person did the following acts:

1. forced a locked door open with a wrecking bar
2. picked a lock with a wire and opened a door
3. turned the knob and opened a door which had been shut but not locked
4. pushed open a partly-open door a few inches more, so that he had room to enter
5. stepped inside a door that was partly open--open enough for him to enter without touching the door

Decide the issue of "breaking" in each of the above cases and state your reasons: ______________________________

____

____

____

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____

____

Nos. 1, 2, 3, and 4 constituted breakings because in each case some force had been used and in each case the force was sufficient to remove the impediment to ingress. (Some courts disagree on facts similar to No. 4.) No. 5 did not constitute a breaking, for even though the slightest force may be sufficient, some force is required and none had been used on the open door. Note that in No. 5 the act of entering did not constitute a breaking.

Since the difference between the slightest force and no force at all may be insignificant, it may seem strange to distinguish between them. It would be strange indeed if No. 5 would not constitute any crime at all. This problem has been resolved by statutes which make the mere entering--without a breaking--a statutory crime. Therefore, in the series of cases, Nos. 1 through 4 could have constituted breakings for common law burglary and No. 5 could have constituted a breaking for a

______________________________ crime.

statutory

Of course, the force must have been applied to a dwelling. Breaking of a fence around a yard would not be a breaking of a dwelling. However, the force need not have been applied to parts of a dwelling designed for ingress and egress (such as doors), but may have been applied to any part of the dwelling (such as roof, floor, etc.). Further, the force need not have been applied directly (such as with a wrecking bar or hammer), but rather may have been applied indirectly (such as by burning). Thus, burning a hole through a wall may constitute a breaking because the act involved the use of actual ________________ sufficient to remove an ____________________ to _________________.

force

impediment

ingress

Since the force may be applied to any part of a dwelling, a breaking may occur where an intruder uses no force to gain ingress, but applies force to some interior part of the dwelling with intent to commit a felony. The force must be applied to part of the dwelling rather than to something that is merely inside--but not an integral part of--the dwelling.

An intruder entered a dwelling through an open door without the use of any force. Inside, he did the following acts with intent to commit a felony:

1. unlocked and opened the bedroom door
2. used a wrecking bar to open a strong box which was sitting on the floor

Decide the issue of breaking in each case and give your reasons.

Unlocking and opening the bedroom door constituted a breaking because the force had been applied to a part of the dwelling. Opening the box would not have constituted a breaking because the force had not been applied to part of the dwelling.

The force must have been applied in order to gain ingress to the dwelling for the purpose of committing some felony (ex: larceny) therein. Suppose, on the other hand, an intruder had entered a dwelling without the use of force with intent to commit a felony, but had been discovered by the owner, and crashed out of a closed window in order to escape. Would the act of breaking out to avoid capture be considered a "breaking" for purposes of common law burglary?_______ Explain:____________

____

____

No. The purpose is to protect from intrusions of the habitation--breaking in in order to commit a felony, rather than breaking out.

So far you have been concerned only with actual force, but remember that the breaking can occur by the use of either actual or constructive force. If the intruder had not used actual force, but had gained ingress by some unlawful means, the courts "construct" some fictional force and hold that the "breaking" element is satisfied by ______________________________ force.

constructive

"Constructive force" is a general term and includes a wide variety of acts. Courts have found "constructive force"--and thus a breaking--where the act involved fraud, misrepresentation, trick, or coercion.

Suppose a person gained entrance to Abbott's home by misrepresenting himself to be a book salesman. Would his conduct have constituted a breaking?_______ Explain:____________________

____

Yes. He had misrepresented the facts in order to gain ingress--constructive force--which may have constituted a breaking.

Suppose the fake book salesman had started to ring Abbott's doorbell but had noticed that the door was ajar and so he pushed it further open and entered. Would his conduct have constituted a breaking?_______ Explain:_____________________________________

____

Yes. He had used actual force sufficient to remove an impediment to ingress.

But now suppose the door had been halfway open and the fake book salesman had entered without touching it. Would his conduct have constituted a breaking?______ Explain:____________________

____

No. There was only an "entering," not a breaking, because the acts had not involved force, either actual or constructive.

The force, misrepresentation, or trick may have been very devious and may have been applied to persons other than owners of the dwelling. For example, if a person had himself sealed in a large package and gained ingress by being mailed or delivered to the dwelling, the act would have constituted a breaking by ____________________ force, even though no misrepresentation had been made directly to the owner.

constructive

If a person at Johnson's door said, "Let me in or I'll kill you," the event would be an example of ________________________ force by the use of ___________________.

constructive

coercion or threats of force

Now you must consider one very important limitation of the principles you have learned. You recall that a breaking involves the use of force by a person who did not have the right to enter. Therefore, the use of either actual or constructive force will not have constituted a breaking if the person had had the right to enter the dwelling.

If a young son unlocked the front door of his family dwelling in order to enter and steal his mother's fur coat, the act would not constitute a breaking because ________________________________

____

even though the son had used actual force, he had had the right to enter the dwelling.

A person who ordinarily does not have the right to enter may acquire the right by consent either expressed or implied.

If, over a period of time, it were customary for Lee's friends, when they called and found that he was not at home, to go into Lee's house, make coffee and wait for him, they would have acquired the right to enter by ______________________________ implied consent.

Now recall the case where a person had gained ingress to Abbott's dwelling by having misrepresented himself to be a book salesman. He obviously had obtained Abbott's express consent to enter, and yet you decided that the act had constituted a breaking by the use of constructive force--and you were correct. It must follow that consent obtained by fraudulent means does not confer the ____________ to ______________.

right

enter

You recall that previously a distinction was made between cases in which the victim consented to an act knowing the nature of the act, and cases in which the victim hadn't comprehended the nature of the act. The distinction does not apply here. Therefore, as a general proposition, where the consent had been obtained by ________________________ means, the courts consider that no right to enter had been given and that the act may have constituted a breaking by the use of ______________ ______________ force.

fraudulent

constructive

The right to enter may be governed by expressed or implied limitations--for example, limitations as to time or place. By specific expression or by implication from custom, Grant may have consented to his servant's entering his dwelling during the week, but not on the week-ends. Thus, if the servant opened the door and entered the dwelling during the week with intent to commit a felony therein, the act would not have constituted a breaking because he had the ________________ to ____________. But if the act had been done on Saturday evening, it could have constituted a breaking because ____

____

right

enter

the act was beyond the limitations of the consent given.

Also note that consent given by a person who did not have the authority to give such consent does not confer the right to enter. If, one night, a person opened the door to Adler's dwelling and entered with intent to commit a felony therein, it would be no defense for him to prove that Adler's neighbor had told him that he could enter.

Thus, there are at least three situations in which common law burglary may occur even though the intruder alleges that a right to enter had been obtained by consent:

1. where the consent had been obtained by ______________________ means;
2. where the act ______________________ the limits of consent; and
3. where the person giving consent had had no ____________________ to do so.

fraudulent

had exceeded

right or authority

Remember that the breaking must have been done with intent to commit a felony in the dwelling. This concept will be discussed in detail in the section analyzing the "intent" element, but you should be aware of the problem at this point in your study. Thus, if a fireman chopped down the door to a dwelling in order to rescue someone, but after he entered he committed grand larceny, his conduct would not have constituted common law burglary because

____

____

the breaking had not been done with intent to commit a felony in the dwelling.

SUMMARY OF PARTICULAR CRIMES

V. Burglary

The common law definition of burglary involves the breaking and entering in the nighttime of the dwelling of another with intent to commit a felony therein.

A. Breaking: A breaking involves the use of force by a person who has no right to enter.

1. Force
   a. Actual force
      1) The slightest force necessary to remove an impediment to ingress is sufficient.
      2) Force must have been applied to some part of the structure of the dwelling, but may have been applied to parts not usually used for ingress and egress.
   b. Constructive force
      1) Involves use of fraud, misrepresentation, trick, coercion, etc.
      2) May be used against someone other than person with right of occupancy.

2. No right to enter (If the defendant had had the right to enter, his acts would not have constituted a breaking.)

   Right to enter may be obtained by consent, expressed or implied.

   a. Fraud negates consent.
   b. Acts beyond the limits of consent may constitute a breaking.
   c. Consent must be given by person with authority to do so.

(Note: Breaking must have been done with intent to commit a felony in the dwelling, and will be amplified in the section on intention.)

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One evening a beggar, looking for a meal, knocked on the kitchen door of the Jones' dwelling. When Jones opened the door, the beggar asked him for dinner and a cup of coffee, and Jones invited him in. The beggar noticed that Jones wore expensive jewelry, and he entered the kitchen with intent to take the jewels (a felony). Could the beggar be guilty of common law burglary? Explain fully.

Common law burglary requires a breaking and an entering of the dwelling of another in the nighttime with intent to commit a felony therein. Each of these essential elements must be satisfied by the facts of the case.

The first essential element, breaking with intent to commit a felony, requires the use of either actual or constructive force. Actual force requires the use of sufficient force to remove an impediment to ingress. The facts show that the owner opened the door and the beggar exerted no force at all. Thus, the facts fail to satisfy the requirements of a breaking by the use of actual force.

Constructive force may be satisfied by facts showing the use of fraud, trick, misrepresentation, or coercion in order to gain ingress. The facts indicate that the beggar knocked on the door and truthfully stated that he wanted a meal. His words and acts which resulted in the Jones' opening the door did not involve any form of deceit or coercion and were done with intent to ask for a meal--not to commit a felony.

Therefore, the facts fail to satisfy the requirements of a breaking with intent to commit a felony by either actual or constructive force. The beggar did enter with intent to commit a felony--but entering with such intent does not constitute a breaking.

The next several requirements (entering, the dwelling of another, nighttime, intent to commit a felony therein) are stipulated and thus do not warrant discussion.

Therefore, the event was not common law burglary because the facts fail to satisfy the element of breaking with intent to commit a felony. There is a possibility that the state in which the event had occurred had created related statutory crimes which do not require a breaking with intent to commit a felony. The event might satisfy the requirements of such a statutory crime.

Booker's club usually met one night a month in his dwelling. Frequently, the first members would arrive before he returned from work. Habitually, the early arrivals would let themselves into his home and entertain themselves until he arrived. One night after the meeting had ended, he left for the week-end. A member who knew of Booker's trip went back to his dwelling and slipped in through a partly-open window to take his jewels (a felony) which were hidden in the bathroom. As the member entered, his back brushed the bottom edge of the window but did not move it. The bathroom door was partly open. He opened the door a bit more, stepped in, and took the jewels. Could the club member be guilty of common law burglary? Explain fully.

Common law burglary requires a breaking and entering of the dwelling of another in the nighttime with intent to commit a felony therein.

A breaking may occur by the use of actual force. The slightest force necessary to remove the impediment to ingress is sufficient. The facts show that the window was open and that the member slipped through without use of any force, except when he brushed the edge of the window. The force was so slight that it did not move the window; thus, it was not sufficient to have constituted a breaking. Opening the bathroom door a bit more was a breaking for some force was necessary to remove an impediment to ingress.

The breaking must be of a dwelling. However, the breaking of any part of a dwelling (even interiors) is sufficient if it is an integral part of the structure. Obviously, the bathroom door is an integral part of the structure.

(Note to the student: Notice that it was decided that the act of slipping through the window was not a breaking and that the act of opening the bathroom door was a breaking. You might wonder why you should bother to discuss the act of slipping through the window in such a case, because it doesn't determine the conclusion reached. This act should be discussed because the facts weren't stipulated and were sufficiently ambiguous to raise an issue. You had to think through the problem before you reached a conclusion. By describing your analysis you are able to show that you recognized the problem and could apply the points of law involved. Discussing issues is just as important as reaching conclusions. The way in which you reach the conclusions is vitally important. Therefore, discuss those issues in which you reach negative conclusions as well as those in which you reach positive conclusions. In contrast, it would not have been appropriate to discuss constructive force because there were no facts that raised that issue. This is an illustration of a technique of writing examinations to insure complete "on point" discussion and avoid immaterial "off point" discussion.)

Now the club member might argue that he had the "right to enter."

A person who ordinarily does not have the right to enter may be given this right by a person having authority to do so by expressed or implied consent. The facts show that the early arrivals let themselves into Booker's dwelling, for his knowledge and acquiescence implied consent. Therefore, the club members had had the right to enter the dwelling. But the breaking in issue concerns the bathroom door. Acts beyond the limitations of consent may constitute a breaking. The facts do not show any evidence of an expressed or implied consent to use the house generally. Further, the defendant did not have the right to enter after the meeting was over and after the owner had left for a week-end.

The other elements (entering, dwelling of another, nighttime, intent to commit a felony) are stipulated.

Thus, the event satisfies all the elements of common law burglary.

O'Neill hired an orchestra to play during the evening at his houseparty. An intruder carrying a trumpet, pretending to be a member of the orchestra, entered with the group of musicians in order to take furs and jewels from the guests (a felony). Would the intruder be guilty of common law burglary?

Common law burglary requires the breaking and entering of the dwelling of another in the nighttime with intent to commit a felony therein.

A breaking may occur by the use of constructive force. Constructive force may be satisfied by facts showing the use of fraud, trick, misrepresentation, or coercion in order to gain ingress. The intruder carrying a trumpet walked in with the orchestra. This was a misrepresentation of the facts in order to gain ingress, and thus was a breaking by constructive force.

The intruder might argue that he had the right to enter. A person who ordinarily does not have the right to enter may be given this right by a person having authority to do so by expressed or implied consent. The facts fail to show any words of expressed consent. Also, the facts indicate that O'Neill did not attempt to stop the intruder when he entered. Assuming that O'Neill was present, his failure to stop the intruder might be construed as an implied consent to enter. However, where the apparent consent was obtained through fraud, trick, misrepresentation, etc., the courts do not recognize the consent. As discussed and shown above, the intruder's pretense misrepresented the facts. Therefore, the intruder had not had the right to enter.

The other essential elements (entering, dwelling of another, nighttime, intent to commit a felony therein) are stipulated.

Since all the essential elements are satisfied by the facts, the event was common law burglary.

The common law definition of burglary requires both a breaking and an entering of the dwelling of another. As you have learned, an entering does not necessarily constitute a breaking. Conversely, a breaking does not necessarily constitute an entering. For example, an intruder might pick a lock and open a front door, but if he heard a noise and ran away to avoid capture, he had broken but not __________________________ the dwelling, and therefore the act could not result in common law burglary.

entered

The second essential element of burglary is an "entering," but of course, special statutes could provide that a breaking without an entering could constitute a ________________________ crime.

statutory

What are the minimum requirements of an "entering"? You learned that the slightest actual force necessary to remove an impediment to ingress was sufficient for a "breaking." Similarly, the slightest ingress is sufficient for an entering. Thus, if the intruder who picked the lock and opened the door had made just one full step across the threshold before he had heard the noise and retreated, the event would have constituted an entering because

____

the slightest ingress is sufficient.

(Note: Once entry has occurred retreat is immaterial.)

Not only is the slightest ingress sufficient, but the slightest ingress of any part of the body may be sufficient.

Suppose in the previous case only the big toe of the intruder's foot crossed the threshold before he retreated, the act still would have constituted an entering because

____

the slightest ingress of any part of the body is sufficient.

Although the slightest ingress is sufficient, the ingress must be of a dwelling and it must proceed to the inside of the dwelling. If an intruder tried to enter a person's dwelling from the roof and had stripped off several shingles but had not cut through the sheathing, the act would not have been an entering because ____

____

it had not caused the slightest ingress.

You recall that the breaking had to be done with intent to commit a felony in the dwelling. The entering also must have been done with intent to commit a felony therein. Both the breaking and the entering must have been done with intent to commit a felony inside the dwelling.

One night Klein's parakeet escaped and flew into Newman's dwelling through an open window. Klein rang Newman's doorbell, but no one was home. Klein turned the knob and opened the front door in order to let the bird fly out. The bird didn't cooperate, so he went into Newman's home after it. Could this act have constituted common law burglary?______ Why?__________________________

____

____

No. Both the breaking and the entering must have been done with intent to commit a felony within the dwelling, and, in this case, both had been done with intent to retrieve the bird.

Assume the same situation except this time, as Klein looked through the open door, he saw a valuable fur coat hanging in the hall. He went into the house to get both the bird and the coat. Could this have constituted common law burglary?_______ Explain:

____

____

____

____

No. Both the breaking and the entering must have been done with intent to commit a felony. Here, Klein entered with intent to take the coat as well as the bird--a felony. However, the breaking was done with only intent to retrieve the bird--not a felony.

Pope planned to steal Kirk's money, and so one night when he thought that Kirk's house was empty, he picked the lock on the front door and opened it. He looked through the doorway and saw Kirk's child writhing on the floor from convulsions. Pope rushed into the dwelling and telephoned a doctor. Could this have constituted common law burglary?_______ Explain:

____

____

____

____

No. Both the breaking and entering must have been done with intent to commit a felony inside. Here, the breaking had been done with intent to take the money (a felony) but Pope had entered with intent to telphone a doctor.

The entering must have been done with intent to commit a felony within the dwelling. A person may break a window of a dwelling and insert his hand in order to unlock the latch with the ultimate intention to steal. But his immediate intention when he inserted his hand would have been to gain further ingress. This distinction has the following effect:

a. The insertion of any part of the body for the immediate purpose of gaining further ingress is an entering, provided the ultimate purpose is to commit a felony within the dwelling.

b. The insertion of an instrument is an entering for purposes of common law burglary only if done for the immediate purpose of accomplishing the intended felony. The insertion of an instrument to gain further ingress is not an "entering" even if the defendant's ultimate purpose is to commit a felony within the dwelling.

Suppose a person broke a glass window and put his hand through the break in order to unlock a latch so that he could come into a dwelling and steal jewels from a box on the dresser. Would the person's conduct have constituted an entering?_______ Explain:

____

____

Yes. The slightest ingress of any part of the body is an entering if done for the ultimate intention of committing a felony within the dwelling.

Suppose the person had used a stick with a hook on it to reach in and unlatch the window. Would his conduct have constituted an entering?_______ Explain:__________________________

____

____

____

____

No. The insertion of an instrument is not an entering unless done for the immediate purpose of accomplishing the intended felony. Insertion of an instrument to gain further ingress is not sufficient even though the ultimate intention is to accomplish a felony.

Suppose the person had inserted the hooked stick in order to catch the handle of a jewel box and obtain the jewels. Would his conduct have constituted an entering?________ Explain:

____

____

Yes. The insertion of an instrument for the immediate purpose of accomplishing the intended felony is an "entering."

Suppose the person inserted the hooked stick in order to unlock the latch and part of his hand went past the window sill. Would his conduct constitute an entering?_______ Explain:__________

____

____

Yes. The insertion of any part of the body with the ultimate intention of accomplishing the intended felony is an entering.

Suppose Wilkes' dwelling was up on pillars. Young bored a hole up through the floor so that money Wilkes had stored on the floor would fall down to him. Was the action of the drill an entering?_______ Explain:______________________________________

____

____

Yes. The action of the drill constituted an entering because it involved the ingress of an instrument with the immediate purpose of accomplishing the intended felony--taking the money.

Suppose the drill had been so small that the hole it made would not have been large enough to allow the money to fall through. Would this fact be material?______ Explain:_________

____

____

____

No. The fact would not be material, for all that is required is that the instrument have been inserted for the purpose of accomplishing the felony. Actual accomplishment is not required.

SUMMARY OF PARTICULAR CRIMES

V. Burglary

The common law definition of burglary involves the breaking and entering in the nighttime of the dwelling of another with intent to commit a felony therein.

A. Breaking

B. Entering: an entering involves ingress to the dwelling.

1. The slightest ingress is sufficient.
    a. Must be of a dwelling
    b. Must reach inside of dwelling--actual ingress

2. Purpose and instrument rule
    a. The insertion of any part of the body is an entering if done for the ultimate purpose of accomplishing the intended felony.
    b. The insertion of an instrument is an entering only if done for the immediate purpose of accomplishing the intended felony. Insertion of an instrument for the immediate purpose of gaining further ingress is not an entering even though the defendant's ultimate purpose is to accomplish the intended felony.

One night an intruder bored a hole through the outside wall of a bedroom of Ferguson's dwelling. He withdrew the bit and pushed a rattlesnake through the hole with intent to kill Ferguson (a felony). Would the intruder be guilty of common law burglary? Explain fully.

Common law burglary requires a breaking and entering of the dwelling of another in the nighttime with intent to commit a felony therein.

A breaking may occur by the use of sufficient force to remove an impediment to ingress. The intruder bored a hole into the dwelling, thus permitting an ingress. The breaking must be of the dwelling, but any part of the dwelling will do if it is an integral part of the structure. The bedroom wall was, of course, an integral part of the dwelling and, thus, the act constituted a breaking of the dwelling.

An entry may occur where there is some slight ingress of an instrument or tool, provided that the immediate purpose is to accomplish the intended felony. The drill bit extended a little way into the interior, but the immediate purpose was to effect further ingress. Therefore, the facts concerning the bit fail to satisfy the requirements of entering. The snake may be considered as a tool or instrument. The intruder pushed the snake into the dwelling for the immediate purpose of killing the owner. This act constitutes an entering of the dwelling with intent to commit a felony therein.

The other essential elements (dwelling of another, nighttime, intent to commit a felony) are stipulated.

Thus, the facts satisfy all the essential elements of common law burglary.

The wooden front door of Walker's dwelling was closed. A couple of inches outside of the front door was a screen door latched from the inside. One night, with intent to commit a felony, Grey cut a hole in the wire of the screen door and put his finger through in an attempt to find the latch. Would Grey be guilty of common law burglary? Explain fully.

Common law burglary requires a breaking and an entering of the dwelling of another in the nighttime with intent to commit a felony therein.

A breaking may occur from the use of sufficient force to remove an impediment to ingress. Cutting a hole in the screen involved the use of such force, and thus constitutes a breaking. (It is not necessary to remove all impediments.)

An entering may occur where there is a slight ingress of any part of the body, even though the immediate purpose is to accomplish further ingress rather than the intended felony. Grey's fingers entered the space between the screen door and the wooden door for the purpose of unlatching the screen door. However, the body (fingers) must have reached the inside of the dwelling. A close question of fact arises as to whether the space inside the screen door, but outside the wooden door, should be construed to be inside the dwelling. The fact that the screen door was locked might be evidence that it was the main barrier to ingress, and once past this door an intruder would be substantially inside. On the other hand, the fact that the wooden door is more substantial and closed and that the two-inch space between the doors is not used for habitation is evidence to the contrary. The difference is technical and definitely not relevant to the general purposes of criminal law. The space between the wooden door and the screen door generally is not considered to be inside the dwelling, and therefore the facts do not support an entering of the dwelling.

The other elements (dwelling of another, nighttime, intent to commit a felony) are satisfied by stipulation. The facts do not satisfy the essential elements of an entering, and thus, the event would not be common law burglary. However, the event might satisfy the requirements of a related statutory crime.

The third essential element of common law burglary involves intention. The definition requires that the defendant have broken and entered with intent to commit a felony. The term "felony" refers to a class of serious crimes. An intruder might not have intended to commit "a class of crimes--a felony." Rather, he must have intended to commit a particular act in the dwelling--"kill the owner,""steal the money,"etc. The intruder must have thought in terms of these acts, not in terms of "a class of crimes--felonies," or in terms of "homicide" or "grand larceny." In this sense, the definition doesn't require that the intruder have intended to commit a "felony," but does require that the defendant have intended to commit an act, which act is classified as a felony. The third element is satisfied if he broke and entered with the intention of committing some act which is classified as a felony.

A man and his wife were recently divorced. The court granted the wife custody of their son. One night the man broke and entered his ex-wife's apartment in order to take their son and go to Mexico permanently. He was caught and charged with burglary--breaking and entering with intent to kidnap their son (a felony). He truthfully argued that he hadn't intended to commit the "felony" of "kidnaping" his own son, but rather to take the boy out of the clutches of his ex-wife. If taking the boy would have been kidnaping, he could be guilty of burglary because ______________________________ he had intended to commit an act which was classified as a felony.

Notice that this principle corresponds to a general principle you learned long ago. The defendant's ignorance that his acts constituted kidnaping would not save him from criminal responsibility because _________________________ of the __________ is not a defense.

ignorance of the law

A person may be guilty of burglary even though he didn't know that the act he had intended at the time of the event was classified as a felony. In the last case, if the man didn't know

1. that his act would be called "kidnaping,"
2. that kidnaping was a felony,
3. what the word "felony" meant,

his ignorance would be immaterial, not a defense.

Suppose an intruder broke and entered a dwelling with the intention of taking some valuable jewelry that he knew was in a desk drawer. He was caught and charged with burglary. He claimed that he had thought that taking the jewelry was only a misdemeanor if no force were used. In fact, taking the jewelry would be a felony (grand larceny). Answer his argument:

____

____

____

The definition doesn't require that a defendant have known that the act he had intended to commit is a "felony." The definition requires only that he have intended to do an act which is classified as a felony. Ignorance of the law is no defense.

Of course, breaking and entering with intent to commit an act, which act is classified as a misdemeanor, may be a ________________ crime.

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statutory

Suppose a person broke and entered with intent to woo the lady of the house. He mistakenly thought such "wooing" was a felony. The state argued that since he had thought the wooing was a felony, he had broken and entered with intent to commit a felony, and so should be guilty of common law burglary. Answer the state:____

____

____

He had broken and entered with intent to commit an act which is not classified as a felony and, therefore, he would not be guilty of common law burglary.

Jones lent the Smiths a valuable painting which the Smiths forgot to return before they went on vacation. Jones broke and entered the Smith's dwelling one night to retrieve his painting. Since the electricity was turned off, he carried away by mistake a painting that belonged to the Smiths. Did he break and enter with intent to commit an act classified as a felony?__________

Explain:____

____

____

No. Even though Jones took the property of another, he hadn't intended to do an act classified as a felony. He had intended to take his own picture, not a felony. Mistake of fact may be a defense.

Although the state is not required to prove that a defendant knew the act that he had intended was a felony, the state must prove that the intended act is, in fact, classified as a felony. Since each particular felony has its own definition, the state must show that the act that the defendant had intended satisfies the definition of the felony alleged.

An intruder broke and entered a dwelling of another one night with intent to have sexual intercourse with the owner's wife, but was captured immediately upon entering. The state charged him with common law burglary and alleged that he had broken and entered with intent to rape. The definition of rape involves force against the will of the victim. The defendant proved that he and the woman had been engaging in these secret activities for over a year, and that he loved her and wouldn't hurt her. What is the issue?____

____

____

____

The state must not only prove the intention to do an act, but the state must show that the intended act satisfies the definition of the felony alleged. In this case, the state must prove that the intruder intended to use force against the will of the wife.

An intruder broke and entered with intent to take the owner's expensive motion picture camera and projector. He was caught while removing the equipment. The state charged him with common law burglary and alleged that he had broken and entered with intent to commit grand larceny. The definition of grand larceny requires intent to permanently deprive an owner of property. Since the intruder had frequently borrowed the equipment before and could prove that he had planned to return it, could he be guilty of common law burglary?_______ Explain:____________________

____

____

____

No. If the defendant could prove that he had planned to return the camera and projector, the state could not prove that the intruder had intended to permanently deprive the owner of the property.

An alcoholic broke and entered the dwelling of another with intent to take a bottle of whiskey worth $5.00 (a misdemeanor). Would he be guilty of common law burglary?________ Explain:

____

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____

No. If the defendant could prove that he had planned to return the camera and projector, the state could not prove that the intruder had intended to permanently deprive the owner of the property.

An alcoholic broke and entered the dwelling of another with intent to take a bottle of whiskey worth $5.00 (a misdemeanor). Would he be guilty of common law burglary?_________ Explain:

No. The value of the whiskey is so low that the taking would be petty larceny (a misdemeanor) rather than grand larceny (a felony). Therefore, the alcoholic hadn't broken and entered with intent to commit an act classified as a felony.

Suppose the alcoholic knew the dwelling contained several cases of whiskey worth over a thousand dollars and he broke and entered with intent to take them all. He would be guilty of common law burglary because ______________________________

____

he had broken and entered with intent to do an act classified as grand larceny (a felony).

Suppose, as would frequently be the situation, an intruder broke and entered with intent to take whatever he could find, rather than a particular item. In such a case, technically the intruder would have had no intention to do an act which satisfies the definition of grand larceny. However, some courts find the intruder guilty of common law burglary on the basis that the intruder had intended to take whatever he could, and it is assumed that the value of the total "take" would exceed the amount required for grand larceny (a felony). Under these conditions some other courts limit the conviction to the statutory crime of breaking and entering with intent to commit petty larceny (a misdemeanor).

Notice that the common law definition doesn't specify particular felonies--any felony satisfies the definition.

Suppose an intruder had broken and entered the dwelling of another in the nighttime with intent to

1. take a valuable painting (grand larceny);
2. kill the owner (homicide);
3. force sexual intercourse upon the owner's wife (rape);
4. set the dwelling on fire (arson);
5. take the owner's son for ransom (kidnaping);
6. take $1,000 from the owner by force (robbery).

Might all of the above consitute common law burglary?_______ What is the issue in each case?____

____

Yes. Whether or not the intended acts are felonies.

Of course, the breaking and entering actually must have been accomplished. The definition does not require, however, that the intended felony have been accomplished. The breaking and entering with intent to do the act is sufficient. The crime of burglary, then, would be complete as of the time the breaking and entering was completed. Therefore, failure to complete the intended act, for whatever reason, is immaterial.

Suppose that one night an intruder broke and entered Wells' dwelling with the intention of taking his son for ransom (kidnaping--a felony). Once inside, it was impossible for him to take Wells' son because

1. the son was not at home;
2. Wells' knocked the intruder unconscious and captured him.

Decide whether or not either or both of these cases constitute common law burglary and give your reasons. ____________________

____

____

____

Both may be common law burglary because the intruder satisfied the definition by breaking and entering with intent to take the son for ransom (a felony). Actual taking of the son is not required. Failure to accomplish the intended felony is immaterial.

Assume the same situation as before, but this time after the intruder was inside Wells' home, he discarded his malicious intentions and sought virtue, and he

1. left quietly so as not to disturb the boy;
2. saw that the boy was having convulsions, called a doctor, and comforted the boy until the doctor arrived.

Decide whether these cases involve common law burglary and give your reasons: ____

____

____

Both could be common law burglary. The crime was complete with the breaking and entering with intent to kidnap the boy for ransom. Thus, failure to take the boy for benevolent motives is immaterial.

The definition of common law burglary requires intention. Recklessness or criminal negligence will not suffice. The state must prove that the intruder broke and entered in order to do an act that is classified as a felony, or prove that he had known with substantial certainty that his conduct would result in an act classified as a felony.

Suppose a tramp who wanted a place to sleep for the evening pried a window of a dwelling open and entered. The owner stepped into the room, saw the intruder coming in with the pry bar in his hand and cried, "Help! He is going to kill me with the bar!" and dropped dead from a heart attack. The state charged the tramp with common law burglary and alleged that he had broken and entered with intent to commit a homicide (a felony). Would the tramp be guilty of common law burglary?_______ Explain:______________________________

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No. Common law burglary requires intention. Satisfaction of the definition of intent to kill would require proof that the defendant had broken and entered in order to kill the owner, or that he had foreseen the owner's death as a substantially certain result. The intruder might have foreseen the death as a possible result--recklessness. Or a reasonable man in the intruder's place might have foreseen the death as possible--criminal negligence. But neither recklessness nor criminal negligence will suffice. Burglary requires intention.

The concept of transferred intent does not apply to burglary. The necessary intention to commit an act classified as a felony can be satisfied only if (1) the defendant had broken and entered in order to accomplish the felony or (2) had foreseen the felony as a substantially certain result.

An employee of a construction company made a mistake on the estimate of a bid. His boss took the papers home. The employee broke and entered his boss's dwelling that evening in order to get the papers from his boss's briefcase and correct the mistake before it was discovered. His boss heard the noise, thought he was in danger, and died from a heart attack. The state might argue that intent to do an unlawful act (take the papers--a misdemeanor) could be transferred to intent to kill the boss (a felony) in order to satisfy the definition of burglary. The argument would fail because the concept of transferred intent does not apply to burglary.

As you know, the intruder must have had the required intention at both the time of breaking and at the time of entering.

Perkins wanted to kill Johnson and spent hours planning various ways to do the deed. One night Perkins was walking by Johnson's house and noted that it was empty. He broke and entered so that he could learn in which bedroom Johnson slept. Would this intention satisfy the requirement for common law burglary?_______

Why?____

____

No. The breaking and entering had not been done with intent to kill, but to learn the house plan.

Lee planned to steal money that Lawson kept in his house. He forced Lawson's door open and looked inside for the money. He saw Lawson beating his wife. Lee rushed in to protect her. Was this a case of common law burglary?________ Why?__________________

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____

____

No. The breaking had been done with intent to steal the money (a felony), but the entering had been done with intent to help the wife. Both the breaking and the entering must have been done with intent to do an act which act is classified as a felony.

The grocery boy, without authorization, opened Helen's kitchen door to deliver the groceries. Inside, he saw her silverware which had just been polished. He came into the kitchen, put the groceries down, took the silverware and left. Did his act constitute common law burglary?_______ Why?____

____

____

No. Both the breaking and entering must have been done with the required intention. Here, the entering had been so done, but the breaking had been done with intent to deliver the groceries.

One night a person walking along the sidewalk looked through the window of Pike's dwelling and saw a rug on fire. He opened the door, rushed in, and stamped the fire out. He noticed a fur coat in the hall, took it, and ran. Could the event constitute common law burglary?______ Why?____

____

____

____

____

No. The intention of stealing the coat had not existed at the time of breaking and entering. Since breaking and entering must be done with intent to do an act which is classified as a felony, an intention to do such an act and commission of such an act subsequent to breaking and entering is immaterial.

SUMMARY OF PARTICULAR CRIMES

V. Burglary

The common law definition of burglary involves the breaking and entering in the nighttime of the dwelling of another with intent to commit a felony therein.

A. Breaking

B. Entering

C. Felony

1. The defendant must have intended to do an act which act is as a felony.
2. The defendant need not have known that the act is classified as a felony. Ignorance of the law is no defense. The defendant would not be guilty of common law burglary if the intended act is not a felony, even though the defendant mistakenly had believed it was.
3. The intended act must satisfy all the essential elements of the felony alleged. Any felony satisfies the definition.
4. The felony need not have been accomplished. Common law burglary is complete when the entering is complete.

D. Intention

1. Satisfied by usual tests
    a. Acting in order to accomplish the felony
    b. Felony a substantially certain result
2. Concept of transferred intent does not apply
3. Intention must have existed at the time of both breaking and entering

A young lover truly loved his sweetheart and wanted to marry her, but just as truly, he despised her father, so he devised a plan to satisfy both emotions. He planned to elope with his sweetheart and, thus, leave the father to a life of loneliness. Further, he planned to make the father believe that his daughter was in danger. On the night of the elopement he crashed an ax through the daughter's bedroom window (of the father's dwelling) and cried, "I've come to get you, Judy! You've got to go. Your time has come!" Judy crawled out of the window and they left. The father, hearing all the violence, died of a heart attack. The state charged the young lover with common law burglary and alleged that he had broken and entered the father's dwelling in the nighttime with intent to commit a felony--the death of the father. Could the young lover be guilty of common law burglary? Explain.

Common law burglary requires the breaking and entering of the dwelling of another in the nighttime with intent to commit a felony therein.

A breaking may occur by the use of actual force sufficient to remove an impediment to ingress. The young lover smashed the glass with an ax and thereby removed the impediment and effected a breaking.

An entering may occur by a slight ingress by any part of the body or by a tool or instrument if the immediate purpose of the instrument is to accomplish the intended felony. The facts indicate that no part of the lover's body entered. The ax entered some slight distance past the glass, but the immediate purpose in using the ax was to allow the girl to leave. Thus, the facts fail to show an entering.

Both the breaking and the entering must have been done with intent to commit an act classified as a felony. The felony alleged by the state was homicide. The young lover could have foreseen the death of the father as a possible or probable result of all the commotion (recklessness), but not as substantially certain. Since intention is required, recklessness need not be analyzed in detail.

The requirements of dwelling of another and nighttime were stipulated.

The event was not common law burglary because (1) the breaking had not been done with intent to do an act classified as a felony, and (2) there had been no entering.

The common law definition of burglary involves the breaking and entering in the nighttime of the dwelling of another with intent to commit a felony therein. Each element of this definition is necessary. The act is not common law burglary unless the structure which was broken and entered was, at the time of the event, a ____________________.

dwelling

The fourth essential element of common law burglary involves the legal concept of a "dwelling." The determination of whether or not a structure is a dwelling depends upon the way the structure is used. In order to be a dwelling a structure must be used as a shelter for sleeping.

Suppose a realtor lived in a brown house in a new development and used a completely furnished white house as a sales model. Although the structures were identical, only the brown house is a dwelling for purposes of common law burglary because ________________

____

only the brown house was used as a shelter for sleeping.

A bachelor "practically lived" in his radio repair shop. In addition to his work bench and tools, the shop contained living room furnishings and kitchen facilities. He prepared and ate all of his meals there, but he slept in a bare rented room one block away. His shop is not his dwelling because ____________________________

____

he didn't use his shop as a shelter for sleeping ~~and~~ such use is essential for "dwelling" in common law burglary.

Not only is "use as a shelter for sleeping" the test, it is the one and only test. Therefore, even though the radio repairman did nothing but sleep in the bare rented room, this room was his dwelling because ____

____

he used the room as a shelter for sleeping and this is the one and only test for a "dwelling."

Be careful to distinguish between the concepts "dwelling" and "home." "Home" implies that the structure is used for many activities associated with general living. "Dwelling," on the other hand, has one and only one test--use as a shelter for sleeping. Thus, a room in a dormitory or hotel might not be considered to be a home, but such a room could be a _______________ for purposes of common law burglary.

dwelling

Another distinction involves the view that a person has only one home at one time, but he may have several dwellings. A person owned his old family mansion in Connecticut and a downtown apartment in New York City. He considered only the family mansion to be his home. Both structures could be dwellings for purposes of common law burglary because ______________________________

____

both structures were used as shelters for sleeping.

It is not sufficient that a structure be suitable for use as a dwelling and that such use is planned for the future. The structure must have been actually used as a dwelling.

A couple's newly-built house was furnished and ready for occupancy. It was broken into and entered the night before they moved in. The act would not have constituted common law burglary because ____

____

the structure had not actually been used as a dwelling.

Once a structure has been occupied and actually used as a dwelling (shelter for sleeping), its character as a dwelling is not lost by temporary vacancy.

The breaking and entering of Bill's unoccupied house while he was bowling may be common law burglary because an unoccupied structure may be a dwelling if it is only ______________________ vacant.

temporarily

Temporary vacancy implies that the occupant left with intent to return and use the structure as a shelter for sleeping. Thus, if Bill left his dwelling for a week on business, or for a year's cruise, the unoccupied structure will still be a dwelling if he

____

____

intends to return and use the structure as a dwelling (shelter for sleeping).

A structure does lose its character as a dwelling if it is abandoned.

Suppose an occupant left his house because his dwelling had been condemned and was to be demolished to make room for an expressway. The unoccupied structure would not be a dwelling because ____

____

the structure had been abandoned; the occupant had left with no intention of returning and using the structure as a dwelling.

Be very sure to notice that the structure would not be a dwelling even if the occupant did intend to return, if he did not intend to use it as a shelter for sleeping when he returned.

Assume that a person moved from his old dwelling house into an apartment, and that he planned to remodel the old structure and use it as a business office. The vacant structure would not be his dwelling because ____

____

although he intended to return, he did not intend to use the structure as a dwelling (shelter for sleeping).

An unoccupied structure which had once been occupied and used as a shelter for sleeping was broken into and entered. Whether or not the act would be common law burglary would depend upon whether or not the structure was a dwelling, which in turn would depend upon whether the unoccupied structure was merely ____________________ ______________ or had been ________________________ (i.e., whether or not the occupant ____ ____).

temporarily vacant

abandoned

intended to return and use the structure as a dwelling (shelter for sleeping).

According to the common law definition of burglary, the structure must be a dwelling. There is one modification. Breaking and entering a "non-dwelling" with intent to commit a felony therein may be common law burglary if the structure is closely associated with a structure which _is_ a dwelling.

Suppose a manufacturing corporation had an office, a warehouse, and a plant all crowded together on one city block. The breaking and entering of the office would not be common law burglary because even though the buildings are closely ______________________, the office is not associated with a ____________________.

associated

dwelling

If a non-dwelling structure is closely associated with a dwelling, it is said to be within the "curtilage" of the dwelling.

The buildings on a farm included a barn, stable, tool shed, silo, and a dwelling house. The barn is not a dwelling, but it might be treated as a dwelling for the purposes of common law burglary if ____

____

it is within the curtilage of the dwelling house, i.e., if it is closely associated with the dwelling house.

The close association between the non-dwelling and dwelling that determines "curtilage" is a matter of degree which is affected by such factors as physical proximity, use for domestic purposes, the grouping effect of common enclosures and the disrupting effect of separation. If the barn, stable, and dwelling house were all grouped closely together in the farm yard, but the tool shed was a mile away, the tool shed would not be within the curtilage.

If the non-dwelling structure is not only physically close to the dwelling, but also its use is closely related to the dwelling (i.e., it is used for domestic purposes) the necessary close association is enhanced.

If the stable had not been used since the horses had been replaced by tractors, and the barn were used to store canned goods and smoked meat, the barn would more likely be considered within the curtilage of the dwelling because ____________________

____

the barn was not only close to the dwelling but it was also used for domestic purposes.

The grouping of the structures together within a common enclosure tends to establish the necessary close association. The barn and dwelling were in the farm yard, but the silo was just beyond the yard. A fence or wall around the the farm yard would group the barn and the dwelling within a ________________________ enclosure and this would tend to include the barn and exclude the silo from the ________________________ of the dwelling.

common

curtilage

If grouping of the structures tends to establish curtilage, separation of the structures tends to defeat curtilage. Superficial separation of the structures by a minor divider, such as a small footpath, would be immaterial, but substantial separation by a major divider, such as a public highway, would tend to destroy the ______________ ______________________ necessary for curtilage.

close association

The factors mentioned are not requirements but are merely examples of evidence which may influence a court's determination of the degree of association. Therefore, "curtilage" would not necessarily be defeated if one or more factors were lacking, for they are not essential elements, but merely evidence of close association. Thus, the facts of the case are evaluated in relation to each other and a judgment made as to whether the structure is closely associated with the dwelling and thus within its ______________________.

curtilage

You have just learned of the "curtilage" modification whereby the breaking and entering of a non-dwelling structure may be common law burglary. Legislatures have made much broader changes by creating various statutory crimes in order to protect a person's interest in structures other than dwellings. Examples of non-dwelling structures covered by statutory crimes are business buildings, ships, railroad cars, automobiles, etc. Some statutes are so broad as to include "any" building.

You will recall that the common law definition requires not only that the structure be a dwelling, but also that it be the dwelling of another. If a person lost his key and so broke and entered his own dwelling, the act would not be common law burglary because ____ the breaking and entering had not been of the dwelling of another.

This requirement does not imply the "other person" must have title to the dwelling. The critical issue has been "use." Thus, "dwelling of another" means that the other person must have the right to use the structure as a dwelling. Title is immaterial.

Suppose the owner of an apartment building broke and entered in the nighttime, with intent to commit a felony therein, an apartment he had leased to a tenant. Would the owner have committed common law burglary even though he had title to the building?________ Explain:_______________________________________

____

____

Yes. He had broken and entered in the nighttime the dwelling of another with intent to commit a felony therein. The dwelling of another means right of another to use the structure as a dwelling and this right was enjoyed by the tenant. Title is immaterial.

A valid charge by the state must show that the structure was the "dwelling of another" by designating the person who had the right to use the structure as a dwelling.

Suppose a lawyer agreed to allow a student to occupy his dwelling for the summer in exchange for the student's promise to take care of the property. If the structure were broken and entered during the summer, which person should the charge designate as having the right to use the property as a dwelling--the lawyer or the student? ____________________ Explain:________________________

____

the student

The student had the right to use the structure as a dwelling.

Notice that the property interest involved is not merely "the right to use the structure" but "the right to use the structure as a dwelling, i.e., as a shelter for sleeping."

Suppose that instead of having agreed to allow the student to occupy his dwelling, the lawyer had agreed to pay him for taking care of the property. If the structure were broken and entered while the student was inside making repairs, which person should the charge designate--the lawyer or the student?________________

Explain:____

____

____

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the lawyer

The lawyer had the right to use the structure as a dwelling; the student had the right to care for the property, but not to use it as a dwelling.

SUMMARY OF PARTICULAR CRIMES

V. Burglary

The common law definition of burglary involves the breaking and entering in the nighttime of the dwelling of another with intent to commit a felony therein.

A. Breaking

B. Entering

C. Felony

D. Intention

E. Dwelling: The critical test is "use as a shelter for sleeping."
  1. The structure must have been so used. Planned future use will not suffice.
  2. Vacancy
    a. Temporary
      1) If occupant intended to return and use as a dwelling, it retains its character as a dwelling, even though vacant.
      2) If occupant intended to return, but use the structure for purposes other than dwelling, the structure is not a dwelling.
    b. Abandonment: The structure is no longer a dwelling.
  3. Curtilage
     A non-dwelling is treated as a dwelling for purposes of common law burglary if it is within the curtilage of a dwelling. Close association necessary for curtilage is affected by such factors as physical proximity, use for domestic purposes, common enclosures, and dividers.
  4. Dwelling of another
     The test is "right of occupancy by another." Title is immaterial. The charge should designate the person who has the right of occupancy, rather than the person who has title.

Smith operated a hardware store in a building he rented from his father. The store was just one block from his home. Several burglaries had occurred in the neighborhood, so for the last month Smith had been sleeping in the store. He'd go home for all his meals and spend the evening until about 11:00 p.m. with his wife and then go sleep in the store. One night about 11:30 an intruder tried to break into a nearby store. The burglar alarm went off and the intruder fled, with the owner of the store in pursuit. The intruder saw that a window in Smith's hardware store was partly open. He pushed it further open so that he could crawl in and hide. As he raised the window he saw a can of kerosene inside. It occurred to him to set the hardware store on fire and escape in the confusion. As he swung a leg over the window sill he was caught and pulled back by Smith. Could the intruder be guilty of common law burglary? Explain fully.

Common law burglary requires the breaking and entering of the dwelling of another in the nighttime with intent to commit a felony therein.

A breaking may occur from the use of the slightest actual force if it is sufficient to remove the impediment to ingress. Although the window was open, some slight force was necessary to raise it enough to allow ingress, and thus the act constituted a breaking.

An entering may result from the slightest ingress of any part of the body. Thus, swinging one leg over the sill was sufficient.

Both the breaking and the entering must have been done with intent to commit a felony. The defendant had entered in order to set fire to the structure (arson--a felony), but the act of breaking (raising the window) had been done in order to hide to avoid capture, rather than to commit a felony. Thus, the act could not constitute common law burglary.

The breaking and entering must be of the dwelling of another. To be a dwelling, the structure must be used as a shelter for sleeping. Even though the store ordinarily was not used as a dwelling, and even though most other activities associated with a dwelling (meals, recreation, etc.) occurred at Smith's home, Smith had been using the store as a shelter for sleeping for a month or so, and thus it satisfied the requirements. The fact that Smith had a dwelling a block away is immaterial, for a person may have more than one dwelling at a time.

The requirement of nighttime is stipulated.

The event was not common law burglary because the breaking had not been done with intent to commit a felony. The event may satisfy the requirements for a related statutory crime.

An elderly couple owned a city lot that extended from street to street. Their dwelling house fronted on one street and their garage fronted on the other. After the wife died, the husband employed a housekeeper. He converted the garage into "servants' quarters" and the housekeeper lived there free of charge as part of her compensation. She planted a row of shrubbery between the structures to obtain a degree of privacy. After a considerable period of time they had a disagreement and the housekeeper quit the job and moved out. The husband remodeled the structure so that it could once again house his automobile. He moved downtown to his club while he looked for a woman who would run the house for him, but not live in. One night an intruder broke and entered the structure containing the automobile with intent to commit a felony therein. Could he be guilty of common law burglary? Explain fully.

Common law burglary requires the breaking and entering of the dwelling of another in the nighttime with intent to commit a felony therein.

Since the elements (breaking, entering, nighttime, intent to commit a felony therein) are stipulated, the only problem is that of the dwelling.

To be a dwelling, a structure must have been used as a shelter for sleeping. The housekeeper had so used the garage, but at the time of the breaking and entering the garage was vacant. Where a structure has been used as a shelter for sleeping, its character as a dwelling is not destroyed by temporary vacancy if the occupant intends to return and use the structure as a shelter for sleeping. Here, the housekeeper never planned to return and the husband intended to use it as a garage, not as a shelter for sleeping. Thus, the garage was no longer a dwelling.

The breaking and entering of a structure which is not a dwelling, but is within the curtilage of a dwelling, may constitute common law burglary. To be within the curtilage, the structure must be closely associated with the dwelling. Close association is established by such factors as physical proximity, common enclosure, separation by dividers, and use for domestic purposes. Here, the dwelling house and garage were on the same city lot (stipulated); thus, they were fairly close together. The only divider was a row of shrubbery. This caused a degree of separation, but it wasn't disruptive; rather, it was a matter of privacy made necessary by the physical proximity. The garage was being used to house the automobile--a domestic use. Although there was no common enclosure, these factors are not essential elements, but matters of degree of evidence. Most of the evidence indicates a close association and the garage could be considered to be within the curtilage of the dwelling house. However, since the dwelling house was vacant, its character as a dwelling must be examined. Applying the principles used above, the husband intended to return and use the house as a shelter for sleeping as soon as he hired a new housekeeper. Thus, its character as a dwelling was maintained.

All elements of common law burglary are satisfied. If the garage were not considered to be within the curtilage of the dwelling, the event could satisfy the requirements of a related statutory crime.

The common law definition of burglary provides that the breaking and entering must be done in the nighttime. Statutes eliminating the requirement of "nighttime" are quite common, however. Nighttime has been defined as the period between sunset and sunrise. Obviously, problems as to precise timing arise at dawn and dusk. Several tests have been used. A typical test is whether the light was sufficient to discern a man's face. During all periods other than dusk and dawn the amount of light is immaterial. Decide which of the following would be nighttime for purposes of common law burglary and give your reasons:

1. pitch-black midnight
2. midnight with a full moon so bright you could discern a man's face
3. sunrise when there is just enough light to discern a man's face.

____

____

____

Numbers 1 and 2, nighttime. The degree of light is immaterial except at dusk and dawn. Number 3, not nighttime because there was sufficient light to discern a man's face at dawn.

The fact that the only acts which must have occurred in the nighttime are a breaking and entering is quite obvious because the crime is complete when the entering occurs.

While Jones was on a two-week vacation, an intruder at 2:00 a.m., with intent to steal money from Jones' safe, broke and entered Jones' dwelling. The intruder worked on the safe until noon before he could open it and take Jones' money. Decide whether the events could constitute common law burglary and give your reasons:____

____

____

The events could constitute common law burglary. The only acts which must occur in the nighttime are the breaking and entering; thus, it is immaterial that the felony intended (stealing the money) was not committed until noon--or even committed at all.

Although both the breaking and the entering must occur in the nighttime, it is not necessary that they occur at the same time or even on the same night. All that is required is that they both occur at night and that they both had been done with intent to commit a felony in the dwelling.

An acquaintance of Jackson's knew that he was on vacation and that he had left some money in his dwelling. One night he tried to open Jackson's back door in order to steal the money, but was unable to break the lock before the sky started getting light. He slipped away and returned the next night to find the door open and another thief inside stealing the money. He rushed in to capture the thief and thus enjoy a profitable evening, by collecting a reward, without the necessity of committing common law burglary. Had he committed common law burglary?______ Why?______________________________

No. Both the breaking and the entering must occur at night and both must have been done with intent to commit a felony in the dwelling. Whether or not the breaking was done in the nighttime would depend upon whether or not the sunrise had progressed to the point where it had become possible to discern a man's face. This fact is uncertain. However, the facts are clear that the acquaintance had entered the house with intent to capture a thief, not to commit a felony. Thus, no common law burglary occurred. The fact that the breaking and entering occurred at different times or even different nights is immaterial.

SUMMARY OF PARTICULAR CRIMES

V. Burglary

The common law definition of burglary involves the breaking and entering in the nighttime of the dwelling of another with intent to commit a felony therein.

A. Breaking
B. Entering
C. Felony
D. Intention
E. Dwelling of another
F. Nighttime: The period between sunset and sunrise
   1. At dawn and dusk the typical test is whether or not the light is sufficient to discern a man's face. At all other times the amount of light is immaterial.
   2. Critical time
      a. Only breaking and entering must occur at night. Need not be same night.
      b. Commission or attempt to commit felony need not occur at night, or at all.

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Mr. and Mrs. Green had lived in a trailer for five years. They bought a dwelling house and moved into it on June 1st. They put their trailer in their back yard with the intention of converting it to carry equipment Mr. Green used in his lawn maintenance business. In the meantime, they were in the process of moving usable household items from the trailer to the house. Jones had been observing this and knew that some items were left in the trailer. On June 4th Mr. and Mrs. Green went bowling. Jones crept up to the trailer window and struck a match to see inside. The glare from the window obscured his view, so he raised the window and was going to hold a lighted match inside for a better look. Just as the match passed the window sill it burned his fingers and he dropped it on the floor, setting the trailer on fire. Jones turned and ran. Could he be guilty of common law burglary? Explain fully.

Common law burglary requires a breaking and entering of the dwelling of another in the nighttime with intent to commit a felony therein.

A breaking may result from the use of the slightest force necessary to remove an impediment to ingress. Jones raised the window a sufficient distance to allow ingress. An entering may result from the slightest ingress of any part of the body. Jones' fingers did not quite reach the window sill. An entering may also result by the slightest ingress of a tool or an instrument if the instrument were inserted for the immediate purpose of accomplishing the intended felony. Jones had inserted the match into the structure for the immediate purpose of illuminating the interior, rather than for the purpose of committing a felony. Therefore, there was no entering.

Further, both the breaking and the entering must be done with intent to commit a felony therein. Here, the act which could constitute a breaking (opening a window) was done to avoid the glare of the glass. If this were the only fact to be considered, the breaking would not have been done with intent to commit a felony. However, Jones had known that household items were in the trailer. The stealthy nature of his acts is some evidence that he may have intended to take whatever was of value. Even though burglary requires intention to do an act classified as a felony, courts have held that where a person breaks and enters with intent to take whatever he finds of value, the breaking and entering were done with intent to commit a felony (grand larceny). Here, the facts are subject to at least two interpretations:

1. the defendant had just been looking;
2. the defendant would have taken anything of value.

Most juries would probably find that Jones had just been looking, and thus decide that the breaking had not been done with intent to commit a felony.

Since the trailer burned, the state could argue that the defendant had intended the act of inserting a lighted match into the trailer and that he had foreseen the burning as a possible or probable result. This might satisfy the requirements of recklessness, but common law burglary requires intention. The facts do not indicate an intention to burn the trailer. Jones hadn't inserted the match in order to burn the trailer, nor had he foreseen the burning as substantially certain. Thus, the breaking had not been done with intent to commit arson.

The breaking and entering must be of the dwelling of another. To be a dwelling a structure must have been used as a shelter for sleeping. Mr. and Mrs. Green had slept in the trailer for five years. At the time of the event, the trailer was vacant. Once a structure has been used as a dwelling, its character as a dwelling is not lost by temporary vacancy if the occupants intend to return and use it for a shelter for sleeping. The character of the structure as a dwelling is lost if the structure is abandoned. Here, the trailer had been vacant for three days. Mr. and Mrs. Green had not intended to live in it again, but had intended to use it as a vehicle in their business. Thus, the trailer had been abandoned as a dwelling even though it still had household articles in it. However, if the trailer is within the curtilage of a dwelling it is treated as a dwelling for purposes of common law burglary. The facts stipulate that the new house is a dwelling. To be within the curtilage of this dwelling, the trailer must be closely associated with it. Close association is proved by factors such as close physical proximity, no major dividers, common enclosure, and use for domestic purposes. The two structures were not within a common enclosure. This is not a fatal defect, for these factors are not essential elements, but matters of evidence. Since the trailer was in the backyard with no major dividers and was used for domestic purposes of storing household goods, it would probably be considered within the curtilage of the dwelling of Mr. and Mrs. Green.

The breaking and entering must have occurred in the nighttime. The facts are not explicit, but since Jones had needed to strike a match, it is reasonable to assume that the event had occurred in the nighttime.

The event was not common law burglary because (1) the breaking had not been done with intent to commit a felony; and (2) there had been no entering; thus, no entering with intent to commit a felony.

Fleet owned a houseboat which he leased to Jackson for his use on week-ends and holidays for fishing. Jackson left charts on the boat that an old-time fishing guide had given him, on which all the best fishing places had been marked. Week-end fishermen paid Jackson $50.00 a day to take them to one or more of these places; thus, the charts were very valuable. Fleet wanted very much to know where some of these spots were. One night as Fleet was walking by the boat, he heard a cry for help coming from inside. He crashed through the flimsy door and found Harden on the floor writhing in pain. Harden, who was hired by Jackson to look after the boat, had broken and entered through the rear door to steal a new 40 hp outboard motor. He had hurt himself trying to carry it out. Fleet helped him up and Harden limped off without the motor. Fleet knew the charts were kept in the galley and he wanted to look at the fishing spots and memorize them. He opened the door to the galley and saw the charts tacked on the wall, but he couldn't discern the spots. Therefore, he stepped into the galley, took the charts, and left. Discuss all possible burglaries committed.

Common law burglary requires the breaking and entering of the dwelling of another in the nighttime with intent to commit a felony therein.

A breaking may occur by the use of sufficient force to remove an impediment to ingress and the entering may occur by the slightest ingress of any part of the body. When Fleet crashed through the front door both of these requirements were satisfied. But the breaking and entering must be done with intent to commit a felony. These acts had been done with intent to answer the cry for help, and thus could not result in common law burglary even though Fleet subsequently had intended to commit a felony.

A breaking may result from the use of force sufficient to remove an impediment to ingress applied to any part of the dwelling, including interiors, if they are integral parts of the structure. Thus, opening the door of the galley (an integral part of the structure) was a breaking. An entering may occur from the slightest ingress of any part of the body. Fleet stepped into the galley. Both the breaking and the entering must be done with intent to do an act classified as a felony. The act of breaking (opening the door) had been done with intent to study the charts and memorize the fishing spots, and these acts are not classified as a felony. Fleet had stepped into the galley in order to take the valuable charts; thus, the entering had been done with intent to commit an act classified as a felony.

The breaking and entering must be of the dwelling of another. To be a dwelling, the structure must be used as a shelter for sleeping. Jackson slept in the boat on some week-ends and holidays. Since a person may have several dwellings at the same time, it is immaterial that Jackson didn't sleep in the boat all the time and that he had a dwelling elsewhere. The boat was empty at the time of the event. Temporary vacancy does not destroy a structure's character as a dwelling if the occupant intends to return and use it as shelter for sleeping. Apparently Jackson intended such use. The dwelling must be of another. The requirement does not refer to title, but to the right to use the structure as a shelter for sleeping. Here, Fleet had title to the boat, but by lease had transferred the right to use the boat to Jackson. Thus, Fleet's acts involved the "dwelling of another" (Jackson's) even though Fleet had title.

The element of nighttime relative to Fleet's acts is stipulated.

Fleet's acts did not constitute common law burglary because the breaking had not been done with intent to commit a felony. However, the event might satisfy the requirements of a related statutory crime.

Harden's acts must be analyzed.

Relative to Harden, the breaking and entering are stipulated. However, the right to enter is a defense and he might claim such a right, since he was hired to take care of the boat. This right may be conferred by expressed or implied consent. No doubt Jackson had told Harden that he could enter the boat for purposes of his job. However, the right is restricted by expressed or implied limitations--here, by activities associated with the job. Harden had entered for purposes not connected with the job, and thus his acts were beyond the limits of consent and afford no defense.

Harden had broken and entered with intent to take a new 40 hp motor which, of course, is quite valuable; thus, the breaking and entering had been done with intent to commit an act classified as a felony. The fact that he failed to take the motor is immaterial. The felony does not have to be accomplished--only intended.

As shown previously, the boat was a dwelling and obviously would be the dwelling of another with respect to Harden, since Jackson had the right to use it.

The facts stipulate that Fleet's acts occurred at night but do not specify when Harden broke and entered. If these acts had occurred in the nighttime, all elements are met and the event would be common law burglary. If the acts had not occurred in the nighttime, the event may satisfy the requirements of a related statutory crime.

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Perkins wanted to kidnap Rick's young son and hold him for ransom. In order to plan, he needed to know where the boy's bedroom was located in the father's dwelling. He hoped to get inside the dwelling to get this information by pretending to be an official from the tax department checking on property values. He knocked on the door and the boy opened it. Perkins expressed his purpose as a tax assessor and the boy let him in to inspect the house. Since the boy was alone, Perkins decided to kidnap him immediately and devised a plan to give himself a safety valve. He locked the boy in his bedroom, found some papers, and set the kitchen on fire. Then he unlocked the bedroom door and went into the bedroom, got the boy, and left. If apprehended, he would claim that he was rescuing the boy from the fire. Could Perkins be guilty of common law burglary? Discuss fully.

Common law burglary requires the breaking and entering of the dwelling of another in the nighttime with intent to commit a felony therein.

A breaking may result from the use of either actual or constructive force. Since the boy opened the door, Perkins had not exerted any actual force. Constructive force involves the use of fraud, trick, misrepresentation, coercion, etc., in order to gain ingress. Perkins had gained ingress by misrepresenting himself as a tax assessor. Perkins might claim that he was given the right to enter by the boy's expressed consent and such a right is a defense. Where the alleged consent is obtained by fraud, trick, misrepresentation or coercion it does not constitute a defense. Also, the right to enter must be conferred by a person having authority to do so. A young child could hardly have such authority. Thus, no defense was established.

The entering was stipulated.

Both the breaking and entering must have been done with intent to commit a felony therein. The acts just described were done with intent to learn the location of the boy's bedroom, so that a plan for a future kidnaping could be devised. Thus, the breaking and entering had not been done with intent to commit, but to plan, a future felony. The intentions of kidnaping and committing arson acquired subsequent to the breaking and entering are immaterial.

A breaking may occur by the use of actual force necessary to remove an impediment to ingress and the breaking may be of any part of the dwelling, even an interior if it is an integral part of the structure. Perkins had unlocked the boy's bedroom door and opened it. This involved sufficient force, and of course, the bedroom door is an integral part of the structure. The fact that Perkins originally had locked the door is immaterial. The entering of the bedroom was stipulated.

The breaking and entering must have been done with intent to commit a felony. The breaking and entering of the bedroom had been done with intent to kidnap the boy for ransom. Setting fire to the dwelling is immaterial for the breaking and entering of the bedroom were not done for this purpose.

The dwelling of another is stipulated.

The event must occur in the nighttime. Since Perkins had pretended to be a tax assessor it is assumed that he came in the daytime. Also, the parents probably would not leave a young child alone at night.

Thus, the event is not common law burglary because the essential element of nighttime was not satisfied. However, the event could satisfy the requirements of a related statutory crime.

END

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